6

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, ~~1912~~. 1913

No. ~~640~~. 257

THE UNITED STATES, PETITIONER,

vs.

TWENTY-FIVE PACKAGES OF PANAMA HATS, MAXIMO CASTILLO, CLAIMANT.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR CERTIORARI FILED MAY 11, 1912.
CERTIORARI AND RETURN FILED JUNE 4, 1912.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 649.

THE UNITED STATES, PETITIONER,

vs.

TWENTY-FIVE PACKAGES OF PANAMA HATS, MAXIMO CASTILLO, CLAIMANT.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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A United States Circuit Court of Appeals for the Second Circuit.

UNITED STATES OF AMERICA, LIBELLANT, PLAINTIFF IN ERROR,

vs.

25 PACKAGES OF PANAMA HATS, MAXIMO CASTILLO, CLAIMANT, DEFENDANT in Error.

Transcript of Record. Error to the District Court of the United States for the Southern District of New York.

1 United States District Court, Southern District of New York.

UNITED STATES
vs.
25 PACKAGES PANAMA HATS, MAXIMO CASTILLO, CLAIMANT.

Statement.

Second amendment.
Information filed May 16/11.
Exceptions filed May 16/11.
Exceptions argued before Hon. C. M. Hough, May 22, 1911. Opinion filed May 26/11.
Order sustaining exceptions, filed Nov. 24/11.
Stip as to record, filed Dec. 1/11.
Stipulation as to record, filed Dec. 1/11.
Assignment of Errors, filed Dec. 2/11.
Writ of Error, filed Dec. 5/11.
Citation, filed Dec. 5/11.

Writ of Error.

UNITED STATES OF AMERICA, *ss.:*

The President of the United States of America, to the judges of the District Court of the United States for the Southern District of New York, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said District Court before you, or some of you, between the United States of America, libellant, and 25 Packages Panama Hats, Maximo Castillo, claimant, a mani-
2 fest error having happened to the great damage of the said United States of America as is said and appears by its complaint.

We being willing that such error, if any hath happened, should be duly corrected and full speedy justice done to the parties aforesaid in this behalf.

Do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerned, the same to the judges of the United States Circuit Court of Appeals for the Second Circuit, at the United States court house and post office building, in the Bor-

ough of Manhattan, City of New York, together with this writ, that you have the same at the said place, before the judges aforesa on the 2d day of January, in the year of our Lord one thousand ni hundred and twelve, that the record and proceedings aforesaid bei inspected, the said judges of said United States Circuit Court Appeals may cause further to be done therein to correct that er what of right and according to the law and custom of the Unit States ought to be done.

Witness, the Hon. Edward D. White, Chief Justice of the Supre Court of the United States, this 2d day of December, in the year our Lord one thousand nine hundred and eleven and of the indepen ence of the United States the one hundred and thirty-sixth.

[SEAL.] JOHN A. SHIELDS,
Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

The foregoing writ is hereby allowed.

GEO. C. HOLT, J.

(Filed Dec. 5, 1911.)

3 *Clerk's certificate.*

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, Thomas Alexander, clerk of the District Court of the Unit States of America for the Southern District of New York, by virt of the foregoing writ of error and in obedience thereto, do hereb certify that the following pages, numbering from 1 to 22, inclusiv contain a true and complete transcript of the record and proceedin had in said court in the case of the United States of America, libe lant, plaintiff in error, against 25 Packages Panama Hats, Maxim Castillo, claimant, defendant in error, as the same remain of reco and on file in said office.

In testimony whereof I have caused the seal of said court to b hereunto affixed, at the city of New York, in the southern district New York, on the 8th day of December, in the year of our Lord on thousand nine hundred and eleven and of the independence of th United States the one hundred and thirty-sixth.

THOS. ALEXANDER,
Clerk.

4 *Second amended libel.*

United States District Court, Southern District of New York.

UNITED STATES
vs.
25 PACKAGES PANAMA HATS.

On the 15th day of May, in the year of our Lord one thousand nin hundred and eleven, comes Henry A. Wise, United States attorney fo

the southern district of New York, in a cause of seizure and forfeiture of property under the revenue laws of the United States, and by this amended libel informs the court as follows, upon information and belief:

First. That on or about the 5th day of December, 1910, the honorable William Loeb, jr., collector of customs of the United States for the port and collection district of New York, did, after the same had been unladen from the steamships on which the said merchandise hereinafter referred to had been brought and imported into the United States and after due opportunity to enter the same and account for the duties thereon had been had, seize on land within the county and southern district of New York, and within the jurisdiction of this honorable court, certain goods, wares, and merchandise more particularly referred to and described in the annexed schedules marked "Schedules A" and "B," which schedules are hereby made a part hereof as if herein set forth at length.

That the said merchandise is of the value of $28,830.20, or thereabouts, and was imported into the United States and entered and introduced into the commerce of the United States at the said
5 port and southern district of New York from a foreign country, to wit, Panama, by Maximo Castillo, doing business by and under the name of M. Castillo & Co., the owner and agent thereof, and that the said merchandise by virtue of the importation thereof was subject to duty by law, and that the said collector of said port of New York now has and holds the said merchandise within the southern district of New York as forfeited to the United States for the causes propounded as follows:

FOR A FIRST CAUSE OF FORFEITURE.

Second. That the said Maximo Castillo, doing business as aforesaid under the name of M. Castillo & Co., being the owner and importer as aforesaid of the said merchandise, did on various dates between about the 3rd day of January, 1910, and the 16th day of June, 1910, make and attempt to make entry of the said merchandise from the said foreign country into the United States, and did enter and introduce and attempt to enter and introduce into the commerce of the United States said imported merchandise at the said port and southern district of New York, both

(a) By means of certain fraudulent and false affidavits, to wit, certain sworn declarations in writing in which on various dates between about the 3rd day of January, 1910, and the 18th day of April, 1910, the said Maximo Castillo made oath before a notary public falsely and fraudulently, among other things, that the said entry then and there delivered by him to the said collector contained a just and true account of all the goods, wares, and merchandise imported by or consigned to the said M. Castillo & Co. in the steamship from the foreign country therein set forth, and that the invoice and entry then and there produced by him contained
6 a just and faithful account of the actual cost of the said goods, wares, and merchandise embraced, described, and re-

ferred to therein, and that he did not know or believe in the existence of any invoice or bill of lading other than those then and there produced by him, and that he had not in the said entry or invoice secreted or suppressed anything whereby the United States might be defrauded of any part or portion of the duty lawfully due on the said goods, wares, and merchandise embraced, described, and referred to in said invoice and entry, and that to the best of his knowledge and belief the said entry and the declaration thereon were in all respects true; and also

(b) By means of certain fraudulent and false practices and appliances, to wit, among other things, by failing to state to the collector at the said various times of the said entries, the actual cost of the said goods, wares, and merchandise; and also

(c) By means of certain fraudulent and false practices and appliances and by means of certain false and fraudulent invoices, to wit, certain certified invoices embracing, describing, and referring to said merchandise, in which said certified invoices the merchandise therein described and referred to was undervalued, in that said certified invoices stated the actual cost and value of said merchandise to be the figures set forth in the annexed "Schedule A" in the column marked "Entered value," whereas in truth and in fact, as the said Maximo Castillo then and there well know, the actual cost and value of said merchandise was as set forth in the column of said schedule marked "True foreign value."

Third. That the said Maximo Castillo, doing business as M. Castillo & Co., as aforesaid, was, on various dates between the 3rd
7 of January, 1910, and the 16th day of June, 1910, guilty of certain wil/ful acts and omissions by means whereof the United States might be and was deprived of a portion of the lawful duties accruing upon the said merchandise, to wit, in wil/fully committing to declare to the said collector the actual cost of the said merchandise and in wil/fully substituting for the correct and true invoices embracing, describing, and referring to the said merchandise false and fraudulent invoices therefor.

All with intent to defraud the revenue of the United States and contrary to the provisions of subsection 9 of section 28 of the tariff act of August 5, 1909.

Fourth. That thereby, under the provisions of the said act of Congress, the said mechandise became subject to forfeiture and the United States became entitled to a decree of forfeiture.

FOR A SECOND CAUSE OF FORFEITURE.

Fifth. That at all the times herein mentioned Maximo Castillo, doing business as M. Castillo & Co., as aforesaid, was engaged in the business, among other things, of buying, selling, and dealing in Panama hats, which merchandise was imported by him at and through the port and collection district of New York from various foreign coun-

tries, and which merchandise was shipped to and purchased by him at various times by and from various sellers and consignors residing in and doing business in such foreign countries.

That to introduce the said merchandise into the commerce of the United States the sellers and consignors thereof, at or about the several times of shipment, prepared and caused to be prepared in triplicate invoices embracing, describing, and referring to the merchandise comprising each shipment respectively, which invoices
8 were signed by themselves or their duly authorized agents.

That the said invoices were produced to the consular officer of the United States of the consular district in which the merchandise was purchased for export to the United States, and, when so produced, had indorsed thereon a declaration signed by the respective sellers and consignors, or their duly authorized agents, setting forth that the said invoice was in all respects correct and true and was made at the place from which the merchandise was to be exported to the United States, and that it contained a true and full statement of the time when, the place where, the person from whom the same was purchased, and the actual cost thereof, and all charges thereon, and that no discounts, bounties, or drawbacks were contained in said invoice but such as had been actually allowed thereon, and that no different invoice of the merchandise mentioned in said invoice had been or would be furnished to anyone, and that the currency in which said invoice was made out was that which was actually paid or was to be paid for said merchandise.

That annexed hereto and made a part hereof is a schedule marked "Schedule B;" that said schedule refers to and describes certain merchandise imported by the said Maximo Castillo, which merchandise is now in general order.

That said merchandise and each and every case thereof was undervalued and each and every certified invoice embracing, describing, and referring to said merchandise was false and fraudulent, as the said consignors and sellers then and there well knew, in that the said certified invoices set forth and stated that the actual cost and value of said merchandise was as set forth in the column of "Schedule B" marked "Entered value," whereas in truth and in fact the actual cost and value of said merchandise was as set forth in the col-
9 umn of "Schedule B" marked "True foreign value," and the said certified invoices were, and each of them was, false and fraudulent in that each of them stated that no different invoice of the merchandise mentioned therein had been or would be furnished to anyone, whereas in truth and in fact, as said consignors and sellers then and there well knew, a different and other invoice had been furnished to the consignee and importer of said merchandise, which said other invoice stated the actual cost and value of said merchandise embraced, described, and referred to therein to be as set forth in the column of "Schedule B" marked "True foreign value."

And the said consignors and sellers of said merchandise were kn
ingly guilty of certain false and fraudulent practices and of cert
unlawful acts and omissions, by means whereof the United Sta
might be deprived of the lawful duties accruing upon said mercha
dise, in that they did attempt to introduce the said merchandise i
the commerce of the United States upon said false and fraudul
certified invoices, and in that they did unlawfully omit to declare
said certified invoices the actual cost and value of the merchand
embraced, described, and referred to therein, as hereinbefore set for

All with intent to defraud the revenue of the United States a
contrary to the provisions of subsection 9 of section 28 of the ta
act of August 5, 1909.

Sixth. That thereby, under the provisions of the said act of C
gress, the said merchandise became subject to forfeiture and
United States became entitled to a decree of forfeiture.

Wherefore, libellant prays that due process of law issue in that
half as well of attachment to bring the said property within
custody of the court as of monition to all parties in interest
10 appear on the return of such process and duly intervene here
by claim and plea in the premises, and due proceedings bei
had thereon that for the causes of forfeiture aforesaid, the said goo
wares, and merchandise be condemned by decree of forfeiture a
the proceeds of the same distributed according to law or such oth
disposition be had thereof as the court shall direct.

HENRY A. WISE,
United States Attorney for the
Southern District of New York, Proctor for Libellant.
(Office & Post Office Address Rm. 50, U. S. Ct. House & P. O. Bldg

SCHEDULE A.—*Merchandise in warehouse.*

Vessel, date of arrival, and entry number.	Marks and numbers of cases.	Entered value.	True foreign value.	True ho value.
Alliance, 1/31/10, #717	M. C. & C., #26	$802.00	$1,235.40	$1,067.
Pr. Eitel Frederick, 1/17/10, #15709	M. C. & C., #30	600.00	851.83	1,149.
Advance, 2/11/10, #37969	M. C. & C. T., New York, #9	585.00	975.00	1,316.
Panama, 2/15/10, #43504	M. C. & C., #35	702.00	1,284.80	1,734.
Alleghany, 4/18/10, #103934	M. C. & C. B., New York—			
	#34	600.00	1,005.34	1,357.
	36	600.00	1,005.34	1,357.
	37	600.00	1,005.35	1,357.
	38	600.00	1,005.35	1,357.

11 SCHEDULE B.—*Merchandise in general order.*

Vessel, date of arrival, and entry number.	Marks and numbers of cases.	Entered value.	True foreign value.	True home value.
Advance, 4/25/10	M. C. & C.—			
	#42	$599.58	$953.07	$1,286.64
	#41	599.58	953.07	1,286.64
Colon, 5/16/10	M. C. & C., #45	660.00	989.87	1,336.33
Prinz Sigismund, 5/26/10	M. C. & C.—			
	#86	528.12	854.25	1,153.24
	87	528.12	854.25	1,153.24
	88	528.12	854.25	1,153.24
	89	528.13	854.25	1,153.24
	90	528.13	854.25	1,153.24
	91	528.13	854.25	1,153.24
Oruba, 5/26/10	M. C. & C.—			
	#41	525.00	882.66	1,191.59
	42	525.00	882.67	1,191.60
Sarnia, 6/16/10	M. C. & C. B. P.—			
	#21	411.76	598.41	807.85
	22	411.76	598.41	807.85
	23	411.76	598.41	807.25
	24	411.76	598.41	807.85
	25	411.76	598.41	807.85
	26	411.76	598.41	807.85

(Filed May 16/11.)

12 *Exceptions to libel.*

United States District Court, Southern District of New York.

UNITED STATES
vs.
25 PACKAGES PANAMA HATS, MAXIMO CASTILLO, CLAIMANT.

To the Honorable George B. Adams, George C. Holt, Charles M. Hough, Learned Hand, judges of the District Court of the United States in and for the Southern District of New York:

Maximo Castillo, claimant, excepts to the libel of the United States.

First. Because the allegations thereof do not disclose any cause of forfeiture with respect to said goods, wares, and merchandise alleged to be "merchandise in general order" in Schedule B.

Second. Because with respect to the goods, wares, and merchandise alleged to be "merchandise in general order," as set forth in Schedule B, the allegations thereof do not disclose that the libellant shall or may be deprived of the lawful duties, or any portion thereof, accruing upon said merchandise or any portion thereof.

In which particulars the said libel is imperfect and insufficient, and therefore said claimant is not bound to answer the same with
13 respect to said merchandise, and he prays that said libel may be dismissed as to such merchandise.

Dated at New York, May 16, 1911.

(Sd.) COMSTOCK & WASHBURN,
Proctors for Claimant.

(Filed May 16, 1911.)

Opinion of Hon. C. M. Hough, J.

District Court of the United States, Southern District of New York.

UNITED STATES OF AMERICA,
vs.
TWENTY-FIVE PACKAGES OF PANAMA HATS.

On exceptions to second amended libel.
Mr. Washburn for the exceptions.
Mr. Whitney for the libellant.

MEMORANDUM.

HOUGH, J.:

The libel alleges that the collector of the port of New York seized certain Panama hats which had been "unladen from the steamship on which (said hats) had been brought and imported into the United States." It further declares that such seizure was made "after due opportunity to enter (said hats) and account for the duties thereon had been had." It also asserts that said hats were "imported into the United States and entered and introduced into the commerce of the United States" from a foreign country by M. Castillo & Company, the owner and agent thereof (i. e. of said hats).

The hats whose history is thus described are said to be forfeited to the United States under the provisions of subsection 9 of section 28 of the tariff act of 1909, because Castillo & Company were engaged in the business of dealing in Panama hats; they imported hats through the collection district of New York, obtaining them from "various sellers and consignors * * * in foreign countries; in order to introduce the said (hats) into the commerce of the United States the sellers or consignors" prepared and executed in foreign countries false and fraudulent consular invoices; by reason whereof "said consignors or sellers * * * were knowingly guilty of certain false and fraudulent practices * * * in that they attempted to introduce the said (hats) into the commerce of the United States upon said false or fraudulent consular invoices."

The hats aforesaid are, and were at the time of seizure, in "general order."

So far as this case is concerned, the operative words of subsection 9 are as follows: "If any consignor * * * shall enter or introduce or attempt to enter or introduce into the commerce of the United States any imported merchandise by means of any fraudulent or false invoices * * * or shall be guilty of any wilful act or omission by means whereof the United States * * * may be deprived of the lawful duties or any portion thereof accruing upon the merchandise * * * such merchandise * * * shall be forfeited * * * and such person or persons shall upon conviction be fined * * * or be imprisoned * * * or both, in the discretion of the court."

On this libel the inferences most favorable to the libellant are these:

The shipper of these hats executed fraudulent (i. e., under-
15 valued) consular invoices and sent one or more of them to Castillo and also shipped the hats to Castillo. Upon arrival in New York the goods went to general order and no effort has been made to enter them or otherwise take steps to procure their delivery to Castillo or his assignee. The only paper or document relating to these hats, of which the collector has any personal knowledge, is the retained copy of the consular invoice forwarded to him by the consul in accordance with law.

The Government's proposition is that, by reason of the execution of the fraudulent consular invoice in a foreign country, the goods covered by that invoice became subject to forfeiture the moment they had arrived within the territorial jurisdiction of the United States.

The libel does not allege that Castillo ever did anything either in the way of preparing or executing said false invoice or of procuring the execution of the same.

It follows that the forfeiture of the goods can only be upheld by maintaining that the act of executing the false invoice, plus the arrival of the goods in the United States, is enough to work a forfeiture.

It is admitted that this is a new question, arising from the introduction of the words "consignor" and "seller" into the wording of a statute which has been in substantial existence for many years.

It is observable that this penal statute lays down the same measure for a forfeiture of the goods and for the conviction of a person. If any goods are subject to forfeiture, there must be some person who is subject to fine or imprisonment or both. This requires a very strict construction of the provisions of the statute. It also renders unneces-

sary any pursuit of the thought that the goods themselves are
16 the subject of claim, or are (so to speak) tainted with fraud in such wise as to become forfeited to the United States by a proceeding quasi in rem. It must be asserted and proved that some person did the act or acts obnoxious to the statute by force of which the goods concerning which he acted became forfeit.

This amended libel does not allege any such acts against Castillo, but does seek to allege them against Castillo's unknown consignors.

The question thereupon becomes this: Did the consignor, by the act of executing the false invoice and shipping the goods in pursuance thereof, either "enter or introduce or attempt to enter or introduce" the hats aforesaid "into the commerce of the United States."

The word "enter" is technical, and it seems too clear for argument that no entry or attempted entry of these goods has ever been made. (U. S. *vs.* A Cargo of Sugar, 3 Saw., 46.)

It is to me equally plain that the goods have not been introduced into the commerce of the United States. It is true that they have been introduced into the United States, that is to say, they are within the territorial jurisdiction of our country, but that is not enough. (See U. S. *vs.* 4 Bottles, 90 Fed. Rep., 720.)

Not only must there be an introduction into the country, but an introduction into the commerce of the country. The primary and simplest meaning of commerce is an interchange of commodities, and it is impossible that goods can be introduced into commerce until after they are out of general order.

If there has been neither entry nor introduction into commerce, neither has there been any attempt at such entry or introduction, at all events on the part of the consignor who is the only person concerning whose acts the libel speaks.

17 It is to me conceivable that a libel of seizure might be drawn in which it could be set forth that the act of making, executing, and delivering a false consular invoice was but one step in a concerted attempt to make entry or introduction—to show, indeed, a conspiracy to defraud the revenue of which false invoice making was an overt act.

There would be difficulties in the way of doing this growing out of the limitations of criminal jurisdiction, for it is plain to me, as above noted, that if there be not a criminal act there can be no forfeited goods. But this is not such a libel, and it is therefore held that the mere execution of a false invoice, followed by the mere arrival in this country of the goods covered thereby, is not an entry or introduction of the goods, nor an attempt either to enter or introduce.

The exceptions are therefore sustained.

New York, May 26, 1911.

C. M. Hough, *D. J.*

(Filed May 26/11.)

18 *Order sustaining exceptions.*

United States District Court, Southern District of New York.

THE UNITED STATES
vs.
25 PACKAGES PANAMA HATS, MARKED "M C C."

And now, to wit, on the thirty-first day of May, 1911, the exceptions, filed the sixteenth day of May, 1911, to amended libel of information, filed the sixteenth day of May, 1911, having been heard by this court the twenty-second day of May, 1911, and after argument of advocates for the respective parties and due deliberation being had in the premises, and an opinion therein having been filed the twenty-sixth day of May, 1911, it is now ordered, adjudged, and decreed that the exceptions to said amended libel are sustained, and the libel is hereby finally dismissed as to the merchandise alleged to be "merchandise in General Order," as set forth in Schedule B of said amended libel.

C. M. Hough,
U. S. District Judge.

(Filed Nov. 24/11.)

19 *Assignment of errors.*

United States District Court, Southern District of New York.

UNITED STATES OF AMERICA, LIBELLANT, PLAINTIFF IN ERROR,
vs.
PACKAGES PANAMA HATS, MAXIMO CASTILLO, CLAIMANT, defendant in error.

Now comes the United States of America, through its attorney and proctor, Henry A. Wise, attorney for the southern district of New York, and makes and files the following assignment of errors upon which it will rely in its appeal from the judgment and order made by this honorable court on the 24th day of November, 1911, in the above entitled action, sustaining the exceptions to the second cause of forfeiture in the amended libel herein, and dismissing said libel as to the merchandise therein alleged to be "merchandise in general order," as set forth in Schedule B of said amended libel.

I. That the United States District Court for the Southern District of New York erred in holding and deciding that the exceptions to said amended libel should be sustained.

II. That the United States District Court for the Southern District of New York erred in not holding and deciding that the exceptions to said amended libel should be dismissed.

20 III. That the United States District Court for the Southern District of New York erred in holding and deciding that the said amended libel should be dismissed as to the merchandise alleged to be "merchandise in general order," as set forth in Schedule B of said amended libel.

IV. That the United States District Court for the Southern District of New York erred in not holding and deciding that the said amended libel herein should be sustained as to the merchandise alleged therein to be "merchandise in general order," as set forth in Schedule B of said amended libel.

HENRY A. WISE,
United States Attorney for the Southern District of New York.

(Filed Dec. 2, 1911.)

Stipulation as to printing of record.

United States District Court, Southern District of New York.

UNITED STATES OF AMERICA, LIBELLANT, PLAINTIFF IN ERROR,
vs.
PACKAGES PANAMA HATS, MAXIMO CASTILLO, DEFENDANT in error.

It is hereby stipulated and agreed that the record on appeal in the above-entitled action to the United States circuit court of ap-

21 peals in this circuit, shall consist of the following papers, to wit: Second Amended Libel, filed May 16, 1911; Exceptions to Second Amended Libel, filed May 16, 1911; opinion of Hough, J., sustaining Exceptions, filed May 26, 1911; order sustaining Exceptions, filed November 24, 1911; Assignment of Errors; Writ of Error and Citation.

Dated, N. Y., Dec. 1, 1911.

HENRY A. WISE,
United States Attorney for the Southern District of New York, Attorney for United States.

COMSTOCK & WASHBURN,
Attorneys for Claimant.

(Filed Dec. 1, 1911.)

Citation.

By the Honorable George C. Holt, one of the judges of the District Court of the United States for the Southern District of New York, to Maximo Castillo, claimant, greeting:

You are hereby cited and admonished to be and appear before a United States Circuit Court of Appeals for the Second Circuit, to be holden at the Borough of Manhattan, in the city of New York, in the district and circuit above named, on the 2d day of January, in the year of our Lord one thousand nine hundred and twelve, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the Southern District of New York, wherein the United States of America is libellant, plaintiff in error, and you are claimant, defendant in error, to show cause, if any there be,
22 why the judgment and order in said writ of error mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the Borough of Manhattan, in the city of New York, in the district and circuit above named, this 2d day of December, in the year of our Lord one thousand nine hundred and eleven and of the Independence of the United States the one hundred and thirty-sixth.

GEO. C. HOLT,
Judge of the District Court of the United States for the Southern District of New York, in the Second Circuit.

(Filed Dec. 5, 1911.)

23 United States Circuit Court of Appeals, for the Second Department.

No. 180.—October term, 1911. Argued February 20, 1912. Decided March 11, 1912.

UNITED STATES OF AMERICA, LIBELANT, plaintiff in error, *against* TWENTY-FIVE PACKAGES OF PANAMA HATS, Maximo Castillo, claimant, defendant in error.	In error to the District Court of the United States for the Southern District of New York. Before Lacombe, Coxe, and Ward, circuit judges.

On writ of error to the District Court for the Southern District of New York to review an order filed November 24, 1911, sustaining exceptions filed by the claimant to the amended libel of information, so far as said exceptions relate to the merchandise described in Schedule B and referred to in the libel under the general head of "Second Clause of Forfeiture." The libel alleges that the said merchandise described in Schedule B "is now in general order." As to all this merchandise the libel was finally dismissed and the Government sues out a writ of error.

Henry A. Wise, U. S. attorney, and Carl E. Whitney, assistant U. S. attorney, for plaintiff in error.

Albert H. Washburn, for defendant in error.

COXE, J.

The question of practice involved in this review need not be
24 considered because the claimant does not press the point and unites with the Government in asking that the issue be determined on its merits. In his brief he says:

"He would welcome the final determination of the status of the general order goods, which have been in the Government custody for a period approaching two years and necessarily have greatly deteriorated in condition."

There is no dispute upon the evidence, all the relevant facts are before the court, and it is for the interest of both parties that the question be determined without further delay.

The contention on the part of the Government is that the goods of a consignee against whom no charge of wrong doing is made may be forfeited because of the fraud and undervaluation of the consignor before they have entered into the commerce of the United States. It is not alleged that Castillo, the claimant and consignee, participated in or knew of the alleged false invoice. The parties charged with making the false and fraudulent invoice in a foreign country are the "consignors and sellers." Because of their fraud it is contended that the goods may be forfeited the moment they arrive in the United States and before they are entered or an attempt to enter them is made.

The statute under which this proceeding is instituted is penal in character and must be strictly construed. It is necessary for the Government to prove that the goods were entered or an attempt made to enter them by means of a fraudulent or false invoice, affidavit, etc. There is no such proof. They have not been entered nor has any attempt been made to enter them.

They were subject to "general order," which the courts have defined as "an order whereby the collector allows the unlading of the goods and takes possession of them before entry of them is made by the individual owners or consignees." (*The Egypt*, 25 Fed. Rep., 320, at p. 332.) Until entry is actually made or attempted the statute is inapplicable. The only goods here concerned were in "general order" and had not been entered when this suit was commenced.

The condition precedent to a forfeiture, viz. the entry or the attempt to enter, did not exist. The merchandise has never been introduced "into the commerce of the United States." It is
25 not enough that it was brought within the jurisdiction of the United States. No presumption of an intent to enter can be predicated of that fact. It may well be that the owner of such merchandise, after holding it in "general order" until he can ascertain where the best market can be found, intends to ship it to a foreign country.

The undisputed fact that the merchandise was not entered and that no attempt to enter it into the commerce of the United States is sufficient to justify the dismissal of the libel as to Schedule B.

The entire case was carefully considered by Judge Hough and nothing further need be added to his opinion.

The order is affirmed.

26 United States Circuit Court of Appeals, for the Second Department.

No. 180. October term, 1911. Argued February 20, 1912. Decided March 11, 1912.

UNITED STATES OF AMERICA, LIBELANT, plaintiff in error, *against* TWENTY-FIVE PACKAGES OF PANAMA HATS, Maximo Castillo, claimant, defendant in error.	In error to the District Court of the United States for the Southern District of New York. Before Lacombe, Coxe, and Ward, circuit judges.

WARD, *Circuit Judge* (dissenting):

The amendment to the act of June 10, 1890, by subd. 9 of sec. 28 of the act of August 5, 1909, was plainly intended to make the customs system more effective. It seems to me that no foreign consignor or seller could do more than has been done in this case in the way of an attempt to introduce goods into the commerce of the United States by means of a fraudulent invoice. He sold or consigned the

goods to a resident of the United States and filed with the United States consul at Panama, to be forwarded to the collector of customs of New York, invoices in which they were deliberately undervalued. This, in my opinion, made the goods guilty and subject to forfeiture. If they are still the property of the foreign consignor the penalty seems reasonable. If they have been paid for by an innocent purchaser, the result appears hard, but the purpose of the law being to secure the Government, I think the order should be reversed.

At a stated term of the United States Circuit Court of Appeals, in and for the second circuit, held at the court rooms in the post office building in the city of New York on the 21st day of March, one thousand nine hundred and twelve.

Present: Hon. E. Henry Lacombe, Hon. Alfred C. Coxe, Hon. Henry G. Ward, circuit judges.

UNITED STATES, PLAINTIFF IN ERROR,
vs.
25 PACKAGES OF PANAMA HATS, MAXIMO CASTILLO, claimant, defendant in error.

Error to the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York and was argued by counsel.

On consideration whereof it is now hereby ordered, adjudged, and decreed that the order of said district court be, and it hereby is, affirmed.

E. H. L.: It is further ordered that a mandate issue to the said district court in accordance with this decree.

(Endorsed:) United States Circuit Court of Appeals, second circuit. U. S. *vs.* 25 Pkgs. Panama Hats. Order for mandate. United States Circuit Court of Appeals, second circuit. Filed Mar. 21, 1912. William Parkin, clerk.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 28, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of United States against 25 Packages of Panama Hats, Maximo Castillo, Claimant, as the same remain of record and on file in my office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of

New York, in the second circuit, this 6th day of May, in the year of our Lord one thousand nine hundred and twelve, and of the independence of the said United States the one hundred and thirty-sixth.

[SEAL.] WM. PARKIN,
Clerk.

30 UNITED STATES OF AMERICA, ss:

The President of the United States of America to the honorable the judges of the United States Circuit Court of Appeals for the Second Circuit, greeting:

Being informed that there is now pending before you a suit in which United States of America is plaintiff in error and Twenty-five Packages of Panama Hats, Maximo Castillo, Claimant, is defendant in error, which suit was removed into the said circuit court of appeals by virtue of a writ of error to the District Court of the United States for the Southern District of New York; and we, being willing for certain reasons that the said cause and the record and proceedings thereon should be certified by the said circuit court of appeals
31 and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the honorable Edward D. White, Chief Justice of the United States, the 28th day of May, in the year of our Lord one thousand nine hundred and twelve.

[SEAL.] JAMES H. MCKENNEY,
Clerk of the Supreme Court of the United States.

32 (Endorsed:) File No. 23210. Supreme Court of the United States, No. 1134, October term, 1911. The United States *vs.* Twenty-five Packages of Panama Hats, Maximo Castillo, Claimant. Writ of certiorari.

33 Supreme Court of the United States, October term, 1911.

THE UNITED STATES, PETITIONER,
vs.
TWENTY-FIVE PACKAGES OF PANAMA HATS, MAXIMO CASTILLO, CLAIMANT. | No. 1134.

Stipulation as to return to writ of certiorari.

It is hereby stipulated by counsel for the parties to the above-entitled cause that the certified copy of the record now on file in the Supreme Court of the United States shall constitute the return of

the clerk of the Circuit Court of Appeals for the second circuit to the writ of certiorari granted herein.

F. W. LEHMANN,
Solicitor General.
ALBERT H. WASHBURN,
Counsel for Claimant.

May 28, 1912.

(Endorsed:) U. S. *vs.* 25 Pkgs. Panama Hats. Stipulation. United States Circuit Court of Appeals, second circuit. Filed June 1, 1912. William Parkin, clerk.

21 *To the honorable the Supreme Court of the United States, greeting:*

The record and all proceedings whereof mention is within made having lately been certified and filed in the office of the clerk of the Supreme Court of the United States a copy of the stipulation of counsel is hereto annexed and certified as a return to the writ of certiorari issued herein.

Dated New York, June 1st, 1912.

[SEAL.] WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

22 (Endorsed:) File No. 23210. Supreme Court U. S., October term, 1912. Term No. 649. The United States, petitioner, *vs.* Twenty five Packages of Panama Hats, Maximo Castillo, Claimant. Writ of certiorari and return. Filed June 4, 1912.

In the Supreme Court of the United States.

OCTOBER TERM, 1911.

THE UNITED STATES, PETITIONER,
v.
TWENTY-FIVE PACKAGES OF PANAMA hats, Maximo Castillo, claimant.
No. ——.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF THEREON.

The Solicitor General, on behalf of the petitioner, respectfully prays that a writ of certiorari be issued to review the judgment of the Circuit Court of Appeals in this case.

The question.

The question presented is this:

When the seller of foreign merchandise consigned to the United States fraudulently undervalues the same in the consular invoice, is such merchandise liable to forfeiture immediately on its arrival in the United States and before any act done by the consignee to obtain possession of such goods, and even though he be innocent of the fraud?

The answer to this question depends on the construction of subsection 9 of section 28 of the tariff

act of August 5, 1909 (36 Stat. 11, 97), which is as follows:

> That if any consignor, seller, owner, importer, consignee, agent, or other person or persons, shall enter or introduce, or attempt to enter or introduce, into the commerce of the United States any imported merchandise by means of any fraudulent or false invoice, affidavit, letter, paper, or by means of any false statement, written or verbal, or by means of any false or fraudulent practice or appliance whatsoever, or shall be guilty of any willful act or omission by means whereof the United States shall or may be deprived of the lawful duties, or any portion thereof, accruing upon the merchandise, or any portion thereof, embraced or referred to in such invoice, affidavit, letter, paper, or statement, or affected by such act or omission, such merchandise, or the value thereof, to be recovered from such person or persons, shall be forfeited, which forfeiture shall only apply to the whole of the merchandise or the value thereof in the case or package containing the particular article or articles of merchandise to which such fraud or false paper or statement relates; and such person or persons shall, upon conviction, be fined for each offense a sum not exceeding five thousand dollars, or be imprisoned for a time not exceeding two years, or both, in the discretion of the court.

The pleadings and opinions below.

The libel asked the forfeiture of 25 packages of Panama hats, but the writ of error involved only 17 packages, which are described in the "Second cause

of forfeiture" (Rec. 7), and in Schedule B attached to the libel. (Rec. 11.)

The libel avers that Castillo, the claimant, is a hat dealer in New York City, to whom the 17 packages were consigned at divers times in 1910. In each consignment the invoice signed by the seller, and sworn to by him before the American consul, grossly understated the purchase price of the hats; copies of these false invoices were sent by the consul to the collector at New York; and the merchandise was duly shipped by the consignor, who also secretly sent truthful invoices to the consignee. The consignee made no formal claim or entry of the hats, which were placed in the Government warehouse where they remained until the filing of the libel.

The libel then specifically avers that the consignors were thereby knowingly guilty of unlawful acts and omissions by means whereof the United States might be deprived of the lawful duties accruing on said merchandise, and thereby attempted to introduce the said merchandise into the commerce of the United States. (Rec. 9.)

Exceptions were sustained to this second cause of forfeiture, and judgment entered thereon was affirmed by the majority of the Court of Appeals.

In the mind of the trial court the only question in the case was this:

Did the consignor, by the act of executing the false invoice and shipping the goods in pursuance thereof, either "enter or introduce, or attempt to

* * * introduce," the hats "into the commerce of the United States?"

He understood "enter" here to have its technical meaning, that is the transaction by which merchandise is gotten through the customs house (citing *United States* v. *A Cargo of Sugar*, 3 Sawy. 16) in which sense the goods had not been entered.

He was convinced that, while the hats had been introduced into the territory of the United States, they had not been introduced into the commerce of the United States. And, finally, he held that there had been no attempt on the part of the consignor at such entry or introduction. (Rec. 16.)

The majority of the Court of Appeals took the same view. The effect of their opinion is expressed in this quotation: "Until entry [used in its technical sense] is actually made or attempted, the statute is inapplicable."

Ward, Circuit Judge, in his dissenting opinion, said:

> The amendment to the act of June 10, 1890, by subd. 9 of Sec. 28 of the act of August 5, 1909, was plainly intended to make the customs system more effective. It seems to me that no foreign consignor or seller could do more than has been done in this case in the way of an attempt to introduce goods into the commerce of the United States by means of a fraudulent invoice. He sold or consigned the goods to a resident of the United States and filed with the United States Consul at Panama, to be forwarded to the Collector of Customs

at New York, invoices in which they were deliberately undervalued. This, in my opinion, made the goods guilty and subject to forfeiture.

The customs law.

Our customs duties, when *ad valorem*, are based upon the actual market value at wholesale of the imports in the principal markets of the country from which they have come.

It is therefore necessary to ascertain this value accurately, and while the question can not, of course, be left to the testimony of the importer alone, still the latter knows the cost of his goods, and the foreign market value thereof, and common sense suggests that he furnish this information to the customs officers to aid in appraising his merchandise.

The value of such evidence has been recognized by Congress from the beginning. For instance, the act of July 31, 1789, to regulate the collection of duties, provided in section 13, that every person having goods on any ship arriving at any port of entry should make entry thereof with the collector specifying the number of packages and the contents of each, "together with an account of the nett prime cost thereof; and shall moreover produce to the collector, the original invoice or invoices, together with the bills of lading," and the importer was also required to make oath that such invoice contained the "nett prime cost" of the goods. (1 Stat. 29, 39, 40.)

Not only has this requirement ever since remained in the law, but Congress soon provided for the testi-

mony of the consignor by requiring him to swear to the truth of the invoices.

The various laws on the subject were codified in the so-called customs administrative act of June 10, 1890 (26 Stat. 131), a brief statement of the provisions of which will be helpful here:

For the purposes of the customs laws, merchandise is to be deemed the property of the consignee. (Sec. 1.)

All invoices are to be in triplicate or quadruplicate, to be made in the currency of the country from whence imported, or if purchased, in the currency actually paid; and are to be signed by the seller, manufacturer, owner, or agent. (Sec. 2.)

Such invoice must be sworn to before the United States consul, which oath must state the actual purchase price, and the details of the time and place of purchase, or if the merchandise was obtained otherwise than by purchase, the actual market value of the goods; and that no different invoice has been or will be furnished anyone. (Sec. 3.) One copy of this sworn invoice is to remain in the consulate and another copy is to be transmitted to the collector at the port to which the goods are consigned. (Sec. 8.)

If the merchandise exceeds $100 in value, it can not be admitted to entry without the production by the importer of such certified invoice, unless the collector is satisfied that it was impossible to produce such invoice, in which event an affidavit must be made by the owner, importer, or consignee giving all the facts which should be stated in the invoice. (Sec. 4.)

Section 5 gives the forms of the declarations which must accompany all such invoices upon the entry of the merchandise, which forms provide in minute detail for the disclosure of all knowledge in the possession of the importer which will aid in ascertaining the dutiable value of the merchandise; and section 6 provides a heavy penalty for making any false statement in such a declaration.

Section 7 permitted the importer, in making his entry, to add to the cost or value given in the invoice such sum as would raise that figure to the actual market value of the goods at the time of exportation; but if the appraised value exceeded the entered value, additional duties were imposed, and if the undervaluation reached a certain percentage, the goods were to be forfeited.

The section concludes with the provision that the duty shall not in any case be assessed upon an amount less than the invoiced or entered value.

This section was amended by section 32 of the act of July 24, 1897 (30 Stat. 151, 211), by permitting the invoiced figure to be increased only where the goods had been acquired by purchase; it being recognized that where the goods were acquired otherwise than by purchase, authority to increase the invoice was not necessary, for the original invoice if truthful would state the actual market value of the goods.

By the act of August 5, 1909, this section was further amended by permitting the consignee, in making his entry, to deduct from, or to add to, the purchase price in order to arrive at the actual market

value of the goods, and by providing that the duty should not be assessed upon an amount less than the *entered* value.

Section 8 provides that if goods are consigned by the manufacturer for sale in this country, the consignee, in addition to the certified invoice, is to present a statement from the manufacturer showing the details of the market value of such goods, and section 11 provides in minute detail the method of computing such market value from the actual cost.

Said sections 2 to 8, therefore, require from both the consignor and consignee a frank, honest, and complete disclosure of the actual cost and market value of the goods, and this disclosure is compelled as to all goods whether they are free or dutiable, and whether the duty be *ad valorem* or specific.

For the purpose of enforcing this disclosure, section 9 of the act of 1890, incorporating the substance of all previous acts upon the subject, provided for the forfeiture of the imported goods and for the punishment of the guilty consignee, should he fail to make the disclosure or attempt to make entry of his goods by any false means whatever.

This section reads:

> That if any owner, importer, consignee, agent, or other person shall make or attempt to make any entry of imported merchandise by means of any fraudulent or false invoice, affidavit, letter, paper, or by means of any false statement, written or verbal, or by means of any false or fraudulent practice or appli-

> ance whatsoever, or shall be guilty of any willful act or omission by means whereof the United States shall be deprived of the lawful duties, or any portion thereof, accruing upon the merchandise, or any portion thereof, embraced or referred to in such invoice, affidavit, letter, paper, or statement, or affected by such act or omission, such merchandise, or the value thereof, to be recovered from the person making the entry, shall be forfeited, which forfeiture shall only apply to the whole of the merchandise or the value thereof in the case or package containing the particular article or articles of merchandise to which such fraud or false paper or statement relates; and such person shall, upon conviction, be fined for each offense a sum not exceeding five thousand dollars, or be imprisoned for a time not exceeding two years, or both, in the discretion of the court.

While these disclosures by the importers are of greatest importance, and if truthfully made, will render appraisement by customs officials unnecessary, Congress has been unwilling to rely alone on such evidence.

Section 10, therefore, makes it the duty of the appraising officers by all reasonable ways to appraise (any invoice or affidavit to the contrary notwithstanding) the actual market value of the merchandise at the time of its exportation to the United States.

Sections 11 to 18 of the act are devoted to providing the machinery for appraisement, the appoint-

ment of appraisers, and a method of enabling them to get at all available evidence, and of reviewing their decisions, finally, by a Federal court.

The decisions.

Inasmuch as the amendment of the act of 1890 was undoubtedly due to the construction placed thereon by the courts, a knowledge of those decisions is necessary to a proper understanding of the amendment.

In *United States* v. *One Silk Rug* (158 Fed. 974, decided January, 1908), the importer had purchased the rug abroad; the seller grossly undervalued the rug in the invoice, on which invoice the purchaser's agent innocently made the entry. Libel was filed to forfeit the rug under section 9. The Court of Appeals for the Third Circuit held that, under the statute as it then stood, the fraud of the foreign consignor did not authorize a forfeiture. The court concluded its opinion thus:

> If, as contended, this construction embarrasses it [the Government] in the collection of its revenues, the remedy lies in legislative amendment.

In *United States* v. *Twenty Boxes of Cheese* (163 Fed. 369, decided April, 1908), the libel charged that the consignor had made a false invoice with intent to have the United States deprived of certain duties when the goods should be entered at the port of New York. Following the preceding case, Chatfield, District Judge, held that this did not authorize a forfeiture of the cheese.

In *United States* v. *Eighty-two Half-Boxes of Cheese* (164 Fed. 778, decided June, 1908), the same judge held that there was no other provision of the custom laws under which merchandise was subject to forfeiture for fraudulent acts on the part of the consignor alone.

In *United States* v. *Mescall* (164 Fed. 580, decided May, 1908), an assistant customs weigher was indicted for violating section 9 by reporting a false weight of the merchandise in order that it would agree with the weight mentioned in the invoice; the same judge quashed the indictment, holding that defendant was not included in the words "other person" as used in section 9, which he limited to the same class as "owner, importer, or agent," applying the rule *ejusdem generis*.

While this case was reversed by this court in November, 1909 (215 U. S. 26), section 9 had been amended pending that decision.

The same view of the law was taken in *United States* v. *One Trunk, McNally, Claimant* (171 Fed. 772), and *United States* v. *One Trunk, Gannon, Claimant* (175 Fed. 1012, affirmed January, 1912), but, while both of these cases construed the act of 1890, the decisions were rendered after the amendment of 1909, and hence are not material here.

ARGUMENT.

It is thus apparent that at the convening of the special session of Congress in 1909, for the consideration of the tariff, the courts had decided that the stat-

utes then in force did not authorize the forfeiture of imported merchandise, because of any fraudulent acts on the part of the consignors thereof.

With these decisions before them, Congress amended section 9 as hereinbefore quoted. The plain purpose, as said by Judge Ward, "was to make the customs system more effective," and this was to be accomplished by preventing all fraudulent acts in connection with imports, whether committed by the consignor or by the consignee.

But the decision below not only defeats this plain purpose of the amendment, and makes the new statute mean neither more nor less than the old, but makes it impossible to so frame a law as to forfeit imports for the fraudulent acts of the consignors alone.

We submit that these hats were forfeitable; first, because the consignors did attempt to introduce them into the commerce of the United States; second, because the consignors were guilty of acts which might deprive the United States of its duties on said hats.

I.

The consignors attempted to introduce the hats into the commerce of the United States by means of false invoices.

As a prerequisite to forfeiture, the act of 1890 required that the consignee should make an attempt to enter the merchandise; and as said by the court in *United States* v. *A Cargo of Sugar* (3 Sawy. 46), the

entry commenced, or was *attempted* upon the presentation of the declaration or formal bill of entry at the customs house. So that under that law forfeiture could not attach before this document was presented, no matter what fraudulent acts had already been committed.

The holding of the courts below gives to the amended statute precisely the same meaning.

It can not be denied that in amending this section Congress intended to make some change in the law, and it is reasonable to presume that Congress intended by the change to make the law more effective. Pertinent here is the recent language of this court in comparing original section 9 of the act of 1890 with earlier legislation for which it was substituted

> Congress was broadening the scope of the legislation and meaning to reach other persons having something to do in respect to the entry beyond that which was done by the owner, importer, consignee or agent, or else the words consignor and seller were a "meaningless addition."

United States v. *Mescall*, 215 U. S. 32.

A statute should be so construed as to effectuate the legislative intent, and when the language used is susceptible of either a narrow, technical or a broad, popular meaning, the courts must adopt that meaning which will accomplish and not defeat the intent.

> The rule does not exclude the application of common sense to the terms made use of in the act in order to avoid an absurdity which

the legislature ought not to be presumed to have intended.

United States v. *Hartwell*, 6 Wall. 396;

American Security and Trust Co. v. *D. C.*, decided April 29, 1912.

What was intended to be added by amendment?

Under the law as it stood goods were not forfeitable until the technical entry had been made at the customs house, and then only for fraudulent acts of consignees.

The new statute, omitting the technical word "entry," prohibited both the consignors and the consignees from introducing or attempting to introduce merchandise into our commerce by false means.

Now it is said that under our customs system the consignor can not introduce goods into our commerce, but that he can only prepare it for such introduction by the consignee; and, further, that the consignor can not, in any legal sense, *attempt* to commit a crime which it is physically and legally impossible for him to consummate.

So that, giving to the expressions "introduce into the commerce of the United States" and "attempt" a narrow technical meaning, the lower courts reached the conclusion that Congress intended an absurdity and that when it prohibited a consignor from attempting to fraudulently introduce goods into our commerce, it simply added a few meaningless words to the statute.

Applying common sense to the problem, and applying the broad, popular meaning to the expressions

involved, it seems plain that Congress intended, in forbidding such fraudulent attempt, to prohibit the doing of fraudulent acts which were actually within the power of consignors. Such acts are few in number. The consignor must make an invoice; he must swear to it before the consul; and, finally, he must ship the goods. When these are performed, the consignor has done all he can, and has tried by all means in his power to get the goods into the United States.

And if his invoice and oath were false, he has by such false means "attempted" to introduce his goods into the commerce of the United States.

II.

The consignors were guilty of wilful acts which might deprive the Government of its duties.

The clause of section 9 forfeiting merchandise for such acts seems to have been overlooked by the courts below.

The original section 9 provided for the forfeiture if the consignee should do any other wilful act "which *shall*" result in a loss of duty, while the amended section authorizes the forfeiture if either consignor or consignee do any act which *may* result in such loss to the United States.

And it is to be noted that this cause of forfeiture is not limited to goods entered or introduced, or attempted to be introduced, into the commerce of the United States, but applies to any foreign merchandise brought into the United States. These hats are foreign, and

have been brought into the United States. If the consignor has, in connection with them, done any wilful act which *may* cause a loss of revenue, they are subject to forfeiture.

The false acts charged are the making of false invoices and swearing to them before the consul.

The importance of the invoice to the Government is apparent from the foregoing résumé of the customs laws. The duty on the hats being *ad valorem* (par. 422 of the act of 1909), it is essential to ascertain their market value in the country whence imported.

The invoice gives the appraiser a starting point in estimating this value. And it must be the starting point of any fraud on the customs revenues; for if that invoice is correct, the United States can not be defrauded, because it will then state the exact sum on which the duty must be assessed. Prior to 1909, by the terms of section 7, the duty could not be assessed on any sum less than the invoiced value. So that it was an impossibility to defraud the United States without the aid and connivance of the consignor. And this is still substantially true, for, while under section 7 as amended in 1909, if the consignee paid more for the goods than their market value, he may deduct from the invoice in making his declaration, such deduction will put the appraiser on guard and make him too alert to be imposed on.

The truth is that the wilfully false invoice is always the beginning of a fraud on the Treasury, which fraud can only fail of consummation because of a change of heart of the importer, or because of the vigilance of

the appraiser. It inevitably follows, therefore, that the making of a false invoice on the part of a consignor is an act which *may* and probably will deprive the Government of its revenue.

It is impossible to overestimate the importance to the United States of the holding that such an act on the part of the consignor is not punishable. It means that in the present state of the law every consignor may with impunity undervalue his goods in the consular invoice, and leave it to the consignee to try to get them through on such valuations, with absolutely no liability to forfeiture or other penalty if the fraud is discovered before the consignee acts. It also means, what is far more important, that it is impossible to frame a statute which will authorize the forfeiture of merchandise for the acts of consignors alone, and that the United States is absolutely unable to effectually protect its revenues from the fraudulent acts of sellers and consignors of foreign merchandise.

This is the first case involving the construction of this statute, and it is submitted that the question is of so grave a character, and of such public importance, as to justify the issue of a writ of certiorari.

F. W. LEHMANN,
Solicitor General.

J. C. ADKINS,
Of Counsel.

MAY, 1912.

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~~No. 1134.~~

Supreme Court of the United States.

OCTOBER TERM, 1911.

THE UNITED STATES,
Petitioner,

vs.

TWENTY-FIVE PACKAGES OF PANAMA HATS,

MAXIMO CASTILLO,
Claimant, Respondent.

BRIEF OPPOSING PETITION.

ALBERT H. WASHBURN,
Of Counsel for Respondent.

C. G. Burgoyne, 72 to 76 Spring Street, New York.

Supreme Court of the United States.

OCTOBER TERM, 1911.

THE UNITED STATES,
PETITIONER,
vs.
25 PACKAGES OF PANAMA HATS.
MAXIMO CASTILLO,
CLAIMANT.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Statement.

The question broadly presented by this petition is whether the act, in a foreign country, of a seller or consignor of merchandise, sold or consigned to the United States, in fraudulently undervaluing the same in a consular invoice, operates to work the forfeiture of such merchandise immediately upon its arrival within the territorial jurisdiction of the United States before any entry or attempt to enter has been made, even though the purchaser or consignee be innocent of any fraud. The libel is based on Sub-section 9 of Section 28 of the Tariff Act of August 5th, 1909, providing:

> "That if any consignor, seller, owner, importer, consignee, agent or other person or persons, shall enter or introduce, or attempt to enter or introduce, into the

commerce of the United States any imported merchandise by means of any fraudulent or false invoice, affidavit, letter, paper, or by means of any false statement, written or verbal, or by means of any false or fraudulent practice or appliance whatsoever, or shall be guilty of any willful act or omission by means whereof the United States shall or may be deprived of the lawful duties, or any portion thereof, accruing upon the merchandise, or any portion thereof, embraced or referred to in such invoice, affidavit, letter, paper, or statement, or affected by such act or omission, such merchandise, or the value thereof, to be recovered from such person or persons, shall be forfeited, which forfeiture shall only apply to the whole of the merchandise or the value thereof in the case or package containing the particular article or articles of merchandise to which such fraud or false paper or statement relates; and such person or persons shall, upon conviction, be fined for each offense a sum not exceeding five thousand dollars, or be imprisoned for a time not exceeding two years, or both, in the discretion of the court" (36 U. S. Stat., Part 1, p. 97).

The "second amended libel" here involved, alleges two causes of forfeiture. In the "second cause of forfeiture" (Rec., 7) with which we are here concerned, it is allleged that certain Panama hats were "shipped to and purchased by" one Maximo Castillo (the Claimant). The hats are more specifically described in Schedule B (Rec., 11), where they are referred to as "Merchandise in General Order."

General Order goods have thus been defined:

> "A 'General Order' is an order whereby the Collector allows the unlading of goods and takes possession of them before any entry of them is made by the individual owners or consignees." (*The Egypt*, 25 Fed. Rep., 320, 332).

R. S., 2954, authorizes the Secretary of the Treasury at his discretion to lease such warehouses as he deems necessary for the storage of unclaimed goods. The act of June 22, 1874, C. 391, Sec. 24, 18 Stat., 191, provides that no General Order

store shall be established without the authority of the Secretary of the Treasury and authorizes him to make such regulations as he may deem necessary for the conduct and management of the bonded warehouses, General Order stores, and other depositories of merchandise throughout the United States. R. S., 2989, also authorizes the Secretary of the Treasury to establish rules and regulations to the execution of various provisions relating to warehouses. The Customs Regulations of 1908, established by the Secretary of the Treasury, provide (Art. 1087) that:

> "All merchandise remaining on board any vessel and for which no delivery permit has been received by the discharging inspector, at the expiration of the period allowed by law for the discharge of the cargo, will be sent by the inspector to a General Order warehouse." * * *

Art. 1088 provides that:

> "At the expiration of forty-eight hours from final discharge, no permit for delivery having been received by the inspector, the Collector shall send the merchandise to the General Order stores."

Art. 1089 provides that the storage shall be at the expense of the owner or consignee and at ordinary rates. Art. 1091 gives the form of the permit, signed by the Collector when unclaimed merchandise is taken possession of by him. Art. 1902 provides:

> "At any time within one year after importation merchandise so taken possession of may be claimed by the consignee and due entry made thereof. But if not so entered within one year, it should be sold at public auction at the next ensuing regular sale, provided, that at any time previous to being sold, it may be entered for consumption or warehouse and withdrawn upon payment of duty and expenses."

This regulation is based upon T. D. 18499, 18929, 21127.

Stated in another way it is evident from the foregoing that merchandise in General Order is merchandise for which no entry has ever been made and which has never been entered or introduced into the commerce of the United States, but lies for all intents and purposes unclaimed in the General Order stores or warehouses, with a privilege open to the consignee of claiming the merchandise within one year after importation and making due entry thereof either within that time or at any time previous to the sale of the merchandise at public auction.

The proceedings in the trial court arose on exceptions to the "second amended libel" in so far as it related to the merchandise set forth in Schedule B — "The Merchandise in General Order." The exceptions were sustained (Rec., 13), and the order sustaining the exceptions (Rec., 18) was subsequently affirmed by the majority of the Circuit Court of Appeals for Second Circuit.

The issue may be re-stated in this language of the Court below:

> "The contention on the part of the Government is that the goods of a consignee against whom no charge of wrongdoing is made may be forfeited because of the fraud and undervaluation of the consignor, before they are entered into the commerce of the United States. It is not alleged that Castillo, the claimant and consignee, participated in or knew of the alleged false invoice. The parties charged with making the false and fraudulent invoice in a foreign country are the 'consignors and sellers'. Because of their fraud it is contended that the goods may be forfeited the moment they arrive in the United States and before they are entered or an attempt to enter them is made."

The respondent contends that:

ARGUMENT.

There has been no attempt to enter or introduce into the commerce of the United States merchandise in General Order within the meaning of Subsection 9 of Section 28 of the Tariff Act of August 5th, 1909.

What constitutes an "attempt to enter" imported merchandise? Subsection 4 of Section 28 of the Act of August 5, 1909, provides:

> "That, except in case of personal effects accompanying the passenger, no importation of any merchandise exceeding one hundred dollars in value shall be admitted to entry without the production of a duly certified invoice thereof as required by law, or of an affidavit made by the owner, importer or consignee, before the collector or his deputy, showing why it is impracticable to produce such invoice; and no entry shall be made in the absence of a certified invoice, upon affidavit as aforesaid, unless such affidavit be accompanied by a statement in the form of an invoice, or otherwise, showing the actual cost of such merchandise, if purchased, or if obtained otherwise than by purchase, the actual market value or wholesale price thereof at the time of exportation to the United States in the principal markets of the country from which the same has been imported; which statement shall be verified by the oath of the owner, importer, consignee or agent desiring to make entry of the merchandise, to be administered by the collector or his deputy * * *."

Subsection 5 of Section 28 provides that one of several declarations set forth in full in the body of this subsection:

> "Shall be filed with the collector of the port *at the time of entry* by the owner, importer, consignee or agent, which declaration so filed shall be duly signed by the owner, importer, consignee, or agent before the

collector or before a notary public or other officer duly authorized by law to administer oaths and take acknowledgments. * * *"

Subsection 7 of Section 28 provides:

"That the owner, consignee or agent of any imported merchandise may, at the time when he shall make and verify his written entry of such merchandise, but not afterwards, make such addition in the entry to or such deduction from the cost or value given in the invoice or *pro forma* invoice or statement in form of an invoice, which he shall produce with his entry, as in his opinion may raise or lower the same to the actual market value or wholesale price of such merchandise at the time of exportation to the United States, in the principal markets of the country from which the same has been imported; * * *"

The way and manner of entering merchandise, not personal effects, and exceeding one hundred dollars in value into the commerce of the United States and the scope or meaning of entry, referred to in Sub-section 9, is thus made plain.

What is prerequisite to such entry is defined by statute, and the decisions have so construed the scope and meaning of the term "entry." In *United States vs. Cargo of Sugar*, 3 Saw., 46, 25 Fed. Cas., 288, cited in the opinions below, the word "entry" as used in Section 1 of the Act of March 3, 1863, was construed to include the series of acts done by the importer at the custom house necessary to the introduction of his merchandise into the United States in compliance with the forms of law. The Court said:

"What, then, is an entry? The term entry in the acts of congress is used in two senses. In many of the acts it refers to the bill of entry: the paper or declaration which the merchant or importer in the first instance hands to the entry clerk. In other statutes it is used to denote, not a document, but a transaction: a series of acts

which are necessary to the end to be accomplished, viz, the entering of the goods. In the latter sense it is used in this statute. The language is: 'If any owner or consignee shall make or attempt to make an entry by means of false documents, false invoice or any other false or fraudulent appliances.' It is the fraudulent use of means in the attaining of an object and accomplishing of a result, to wit, the entry of the goods, which the statute here denounces. The acts which accomplish this result, and which, taken together, constitute an entry, must have a beginning and an end. *There is a moment when the entry is attempted to be made or begun:* there is a moment when it is accomplished. The entry may be said to be commenced, or *attempted, when the merchant presents his declaration or bill of entry.* When this bill of entry has gone to the requisite clerks' desks, when accompanied by the certificate of the consul, the invoice and the oath, it is delivered to the collector and accepted by him, then the goods may, in a just sense, be said to be admitted to entry and the entry to be accomplished. If in the performance of any of those acts, and as a means of making the entry, any false document, appliance or practice is resorted to, then this statute applies and the goods so entered are forfeited to the United States."

To the same effect see *United States vs. Legge*, 105 Fed. Rep., 930, decided by the C. C. A., Second Circuit.

It is evident that the Government seeks to stretch the "series of acts" referred to in these decisions as necessary to constitute an entry so as to embrace "the preparation, production and verification of the invoice by the seller or consignor" before some consular officer in a foreign country. In *United States vs. Mescall*, cited in the Petitioner's brief (pp. 11 and 13) it was not contended that an entry of goods, under the Administrative Act of 1890 anyway, embraced anything more than "the entire transaction *from the time the vessel enters a port* until the importer obtains an entrance of the goods into the body of merchandise in the United States."

The inferences most favorable here to the Government,

as the Trial Court observes, are that the "shipper of these hats executed fraudulent (*i. e.* undervalued) consular invoices, and sent one or more of them to Castillo, and also shipped the hats to Castillo" (Rec., pp. 14 and 15). Assuming all this to be true for argument's sake, *i. e.*, that preparations were made in some foreign country by some unknown consignor in anticipation of the commission of an offense or of an attempt to commit an offense, where is the overt act essential either to the offense or to the attempt to commit an offense? (*Keck vs. United States, 172 U. S., 434.*)

In *United States vs. One Pearl Chain, 139 Fed. Rep., 513*, it was held by the C. C. A., Second Circuit, that mere intent to smuggle goods will not work a forfeiture under the laws of the United States. Though goods are brought in with intent to smuggle them, they may not be seized while the persons importing them may yet change their minds and observe the necessary formalities in due season. In the language of the court, "in other words, mere intent without act will not work a forfeiture." It is elementary to say that the intent must be followed by some act of execution which would result, unless interrupted by some outside agency, in the commission of an offense. The existence of false and fraudulent invoices, conceding them to be false and fraudulent, is comparable with the purchase of a gun with a design to commit murder, or the purchase of poision with the same intent. These are simple illustrations of what may be considered to be in the nature of preliminary preparations. They do not advance the party beyond the sphere of mere intent. In *People vs. Youngs, 122 Mich., 292*, Justice MONTGOMERY, now Chief Justice of the United States Court of Customs Appeals, writing the opinion, it was held that one could not be convicted of an attempt to enter and break into a dwelling merely because he had agreed with another to do so, and met him at a saloon at the appointed time with a revolver and slippers to be used in the house, and went into a drug store and purchased some chloroform to use, being arrested when he came out. In *People vs. Murray, 14 Cal., 160*, the defendant was indicted for an attempt to contract an incestuous marriage, and was found guilty. From the evidence it appeared that he intended to contract such marriage, that he eloped with his

niece for that purpose, and requested a third person to get a magistrate to perform the ceremony. Upon an appeal the judgment was reversed. Chief Justice FIELD, afterwards of the Supreme Court of the United States, delivering the opinion of the court, said :

> " It (the evidence) shows very clearly the intention of the defendant, but something more than mere intention is necessary to constitute the offence charged. Between preparation for the attempt and the attempt itself there is a wide difference. The preparation consists in devising or arranging the means or measures necessary for the commission of the offence ; the attempt is the direct movement towards the commission after the preparations are made : * * * but until the officer was engaged, and the parties stood before him, ready to take the vows appropriate to the contract of marriage, it cannot be said, in strictness, that the attempt was made. The attempt contemplated by the statute must be manifestly by acts which would end in the consummation of the particular offence, but for the intervention of circumstances independent of the will of the party."

So in the recent case of *United States vs. One Trunk*, 171 Fed. Rep., 772, which has since been affirmed, the trial judge very clearly defines what constitutes an " attempt to make entry " :

> " The second consideration is whether, as merchandise, the trunk is forfeited because Mrs. McNally ' attempted to enter ' it. As I understand it, one ' attempts ' a crime where, with an intent to complete the crime, he does any part of the acts which together constitute the complete crime. I do not understand that anything which leads up to, but does not itself constitute a part of, a crime, can alone constitute an attempt to do it. It is often a matter of some casuistry as to just where the series of acts actually begins which, when completed, would constitute a crime ; for by no means all those things which are necessary conditions to the commission of crime are a part of the crime itself. In

this case it is no doubt a necessary condition to the entry of the goods that Mrs. McNally should take out the invoices in Paris and send one to the customs house, because that was a condition of entry; but it was not, on that account, necessarily a part of the entry. In my judgment the entry does not begin, at the earliest, until the owner, after the goods reached this country, begins that series of acts through which, by application to the customs officials, he gains possession of his goods. If this is so, the claimant changed her intent before she performed any of the series of acts which, when completed, would have constituted such entry; and so she made no attempt." (171 Fed. Rep., 774).

Upon the question of introduction or attempted introduction into the commerce of the United States under the law of 1909, the language of the trial Judge is convincing (Rec. p. 16):

"It is to me equally plain that the goods have not been introduced into the commerce of the United States. It is true that they have been introduced into the United States, that is to say, they are within the territorial jurisdiction of our country, but that is not enough (see U. S. vs. 4 Bottles, 90 Fed. Rep., 720).

"Not only must there be an introduction into the country but an introduction into the commerce of the country. The primary and simplest meaning of commerce is an interchange of commodities and *it is impossible that goods can be introduced into commerce until after they are out of general order.*" (Italics ours).

The government theory of interpretation is based upon the amendatory language inserted in the Act of 1909 and in this connection the learned Solicitor General cites certain cases, beginning on page 10 of his brief. The cases of *United States vs. One Silk Rug* (158 Fed., 974, decided January, 1908), *United States vs. Twenty Boxes of Cheese* (163 Fed., 369, decided April, 1908), *United States vs. Eighty-two Half Boxes of Cheese* (164 Fed., 778, decided June, 1908), and *United States*

vs. Mescall (164 Fed., 580, decided May, 1908) differ from the case at bar in this important respect—they cover goods which had been *actually entered* and did not affect the status of goods in General Order. The cases of *United States vs. One Trunk, McNally Claimant*, and *United States, vs. One Trunk, Gannon Claimant*, related to the status of passengers' baggage, where it appeared that the traveler or importer herself accompanying the baggage had sworn to a false invoice value before the American Consul. In each case the fraudulent invoice was not used in making entry but a corrected invoice was. As the learned Solicitor General observes, these decisions were rendered after the amendment had been inserted in the law of 1909 (Brief, p. 11) and it is impossible, therefore, that they could have been in legislative contemplation.

It is conceivable that the new language with respect to *introducing* or *attempting to introduce* imported merchandise into the commerce of the United States, found in Sub-Section 9 of Section 28, was inserted in view of the language of the trial judge in the Mescall case so as to broaden the scope of the section to include a customs weigher, even though it subsequently transpired after the passage of the Act of 1909 that Section 9 of the old Act as construed by the Supreme Court (*United States vs. Mescall*, 215 U. S., 26) was sufficiently comprehensive as it stood. This is something that Congress, of course, could not anticipate.

So it may be safely conceded that *United States vs. One Silk Rug* had something to do with the interpolation of the words *consignor* and *seller* in the new law. But this concession by no means carries with it the implication that there can be a forfeiture under the provisions of the Act of 1909 any more than under the Customs Administrative Act of 1890 in the absence of an attempted entry or introduction so well defined in *United States vs. One Trunk, supra*, and by the trial judge in the case at bar. Neither is it to be implied that there can be any forfeiture under the new law in the absence of a *guilty scienter and intent* on the part of some person after the goods reached this country, which is the earliest point of time at which an attempted entry or introduction can begin. Such is the trend of all the decisions, with which presumably Congress was familiar.

We quote from the Government brief:

> "Now it is said that under our customs system the consignor can not introduce goods into our commerce, but that he can only prepare it for such introduction by the consignee; and, further, that the consignor can not, in any legal sense, attempt to commit a crime which it is physically and legally impossible for him to consummate" (p. 14).
>
> * * * * * *
>
> "The consignor must make an invoice, he must swear to it before the consul; and, finally, he must ship the goods. When these are performed, the consignor has done all he can, and has tried by all means in his power to get the goods into the United States" (p. 15).

We very respectfully beg to suggest that this indicates a misconception of actual facts and practices which may well have been well known to Congress. It is entirely possible for a consignor or owner or seller to make an attempt to enter or introduce merchandise into the commerce of the United States within the meaning of the statute. In the case of McNally Claimant, and Gannon Claimant, *preparations* for an attempt were made, but the *attempt itself* was *not* made. It is by no means unusual for the consignor, owner, or seller of the goods sold for delivery in the United States, for example, to enter or introduce the goods into the commerce of the United States. Such was the case of *United States vs. Citroen*, decided by this Court on February 19th last (223 U. S., 407). There certain pearls for a necklace were sold in Paris by Citroen to Mrs. Leeds for delivery at Newport. If Citroen had caused to be made a false and fraudulent invoice undervaluing the pearls, and his brother, acting as his agent, had made use of such invoice upon entry, the brothers and the pearls would plainly have been in jeopardy under the provisions of Subsection 9; but if, after the pearls had been brought within the territorial jurisdiction of the United States, and prior to any attempted entry or introduction into the commerce of the United States, there had been, as in the case of McNally Claimant and Gannon Claimant, a *locus penitentiæ*, there clearly would have been no violation of the statute.

Let us invoke a simple test which meets the government theory in this case at every point: Suppose the consignor or seller in the case at bar had conceived a plan to make a fraudulent entry of Panama hats into the commerce of the United States and, pursuant to that plan, had caused the preparation and verification of a false and fradulent invoice before a consular officer abroad. Suppose, as not infrequently happens, he had himself brought the merchandise within the territorial jurisdiction of the United States. The exigencies of the situation drive the learned Solicitor General into the position of contending, in effect, that, if the consignor or seller had changed his mind before observing the necessary formalities of entry, as pointed out in the case of smuggled goods, *United States vs. One Pearl Chain, supra*, the hats would, notwithstanding, be liable to seizure under the provisions of Sub-section 9. *What force and effect does the government accord to the explicit provisions of Sub-section 7 of Section 28, permitting addition upon entry to make market value?* Until the consignor or seller actually enters the merchandise, or attempts to enter, or introduce it, whatever may have been his original intent, how can it definitely be said that he would or would not adopt or make use of false or fraudulent consular invoices?

Importers frequently export goods which have been brought within the limits of the port of entry to some foreign port, in which event the goods never enter the commerce of the United States, and the importers are not liable for duties. This is recognized by statute (R. S. 2989).

As the Court below said:

> "It may well be that the owner of such merchandise, after holding it in 'General Order' until he can ascertain where the best market can be found, intends to ship it to a foreign country."

The statute does not penalize the entry, or attempted entry, or the attempt to introduce into the commerce of the United States merchandise which has been false and fraudulently invoiced; it does penalize the attempt to enter or the attempt to introduce into the commerce of the United States

merchandise by some fraudulent acts of commission or omission.

Some hint of the government's embarrassment in framing its libel is seen in the allegation it was found necessary to make (Rec., p. 9), that the consignors and sellers were guilty of certain false and fraudulent practices and of certain unlawful acts "*in that they did attempt to introduce the said merchandise into the commerce of the United States upon said false and fraudulent certified invoices.*"

As to the language, "by means whereof the United States *shall* or *may* be deprived of the lawful duties", it is obvious that there *may* be no loss of duties until the actual *attempt* of the statute has been made.

Finally the learned Solicitor General urges the great public importance of the question here involved. In the case at bar, as appears from Schedule B (Rec. 11), the hats were brought within the territorial jurisdiction of the United States in April, May and June, of 1910. The "second amended libel" was not filed until May 16th, 1911 (Rec., 11). For two years these hats, with the inevitable consequent deterioration, have been in the government custody in spite of diligent effort to secure final action. The possibility of subjecting an innocent purchaser, to whom, for any reason, a foreign shipper might elect to forward a false invoice, even though the purchaser himself repudiated it, to long delay with the certainty of the forfeiture of his property, if the falsity of the *unused* consular invoice be established, is repugnant to every principle of justice. And yet this is the effect of the construction contended for by the Government. For the innocent purchaser no redress, and for the consignor no *locus penitentiæ*. This surely involves a radical departure from the fixed principles of interpretation applied to statutes of this character. As the learned trial judge observes :

> "It is observable that this penal statute lays down the same measure for a forfeiture of the goods and for the conviction of a person. If any goods are subject to forfeiture there must be some person who is subject to fine or imprisonment or both. This requires a very strict construction of the provisions of the statute" (Rec. 15).

It is respectfully submitted that the petition should be denied.

COMSTOCK & WASHBURN,
Proctors for the Respondent-Claimant.

ALBERT H. WASHBURN,
of counsel.

No. 257

In the Supreme Court of the United States.

OCTOBER TERM, 1912.

THE UNITED STATES, PETITIONER,

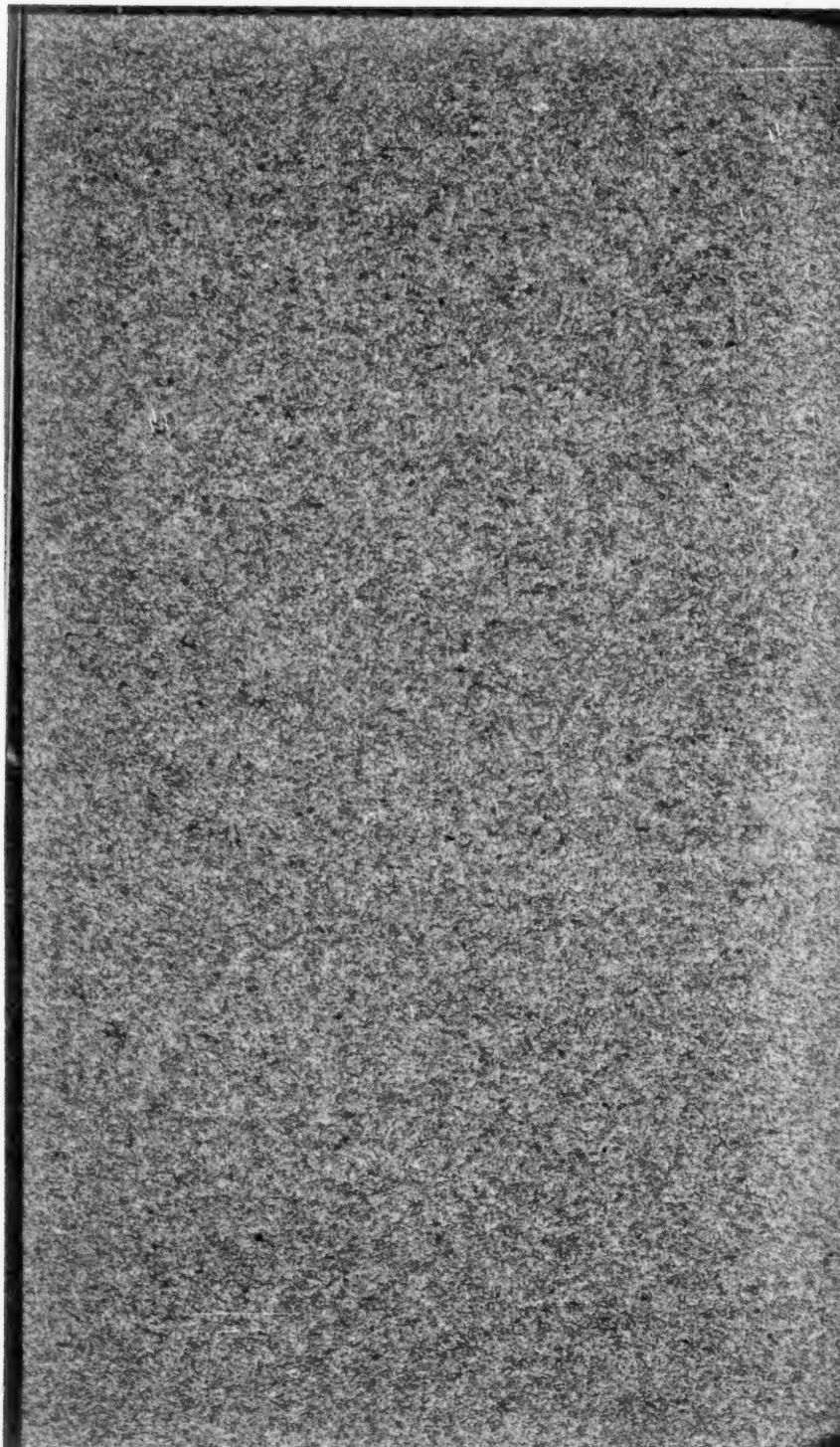
v.

TWENTY-FIVE PACKAGES OF PANAMA HATS, MAXIMO CASTILLO, CLAIMANT.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

MOTION BY THE UNITED STATES TO ADVANCE.

WASHINGTON: GOVERNMENT PRINTING OFFICE: 1913



In the Supreme Court of the United States.

OCTOBER TERM, 1912.

THE UNITED STATES, PETITIONER, v. TWENTY-FIVE PACKAGES OF PANAMA HATS, MAXIMO CASTILLO, claimant.	No. 649.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

MOTION BY THE UNITED STATES TO ADVANCE.

This is a forfeiture proceeding for violation of the customs law, and the Attorney General moves to advance under section 5 of rule 26. The one question in the case is:

When the seller of foreign merchandise consigned to the United States fraudulently undervalues the same in the consular invoice, is such merchandise liable to forfeiture immediately on its arrival in the United States and before any act done by the consignee to obtain possession of such goods, and even though the consignee be innocent of the fraud?

The answer to this question depends on the construction of subsection 9 of section 28 of the tariff act of August 5, 1909 (36 Stat., 11, 97), which is:

> That if any consignor, seller, owner, importer, consignee, agent, or other person or per-

> sons, shall enter or introduce, or attempt to enter or introduce, into the commerce of the United States any imported merchandise by means of any fraudulent or false invoice, affidavit, letter, paper, or by means of any false statement, written or verbal, or by means of any false or fraudulent practice or appliance whatsoever, or shall be guilty of any willful act or omission by means whereof the United States shall or may be deprived of the lawful duties, or any portion thereof, accruing upon the merchandise, or any portion thereof, embraced or referred to in such invoice, affidavit, letter, paper, or statement, or affected by such act or omission, such merchandise, or the value thereof, to be recovered from such person or persons, shall be forfeited, which forfeiture shall only apply to the whole of the merchandise or the value thereof in the case or package containing the particular article or articles or merchandise to which such fraud or false paper or statement relates; and such person or persons shall, upon conviction, be fined for each offense a sum not exceeding five thousand dollars, or be imprisoned for a time not exceeding two years, or both, in the discretion of the court.

The courts below held that the merchandise was not liable to forfeiture. This construction repeals half the statute, for under it the consignor and seller may do everything in their power to defraud the United States of revenue in connection with a particular importation, and the Government is powerless

to act until the consignee has adopted the fraud and endeavored to carry it out. An early decision is essential to protect the revenue from such frauds. And if the construction below is correct, Congress may wish to amend the statute.

Opposing counsel concur.

JAMES C. MCREYNOLDS,
Attorney General.

APRIL 1, 1913.

○

No. 257

In the Supreme Court of the United States.

OCTOBER TERM, 1919.

THE UNITED STATES, PETITIONER,

v.

TWENTY-FIVE PACKAGES OF PANAMA HATS, MAXIMO CASTELLO, CLAIMANT.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR PETITIONER, THE UNITED STATES.

WASHINGTON : GOVERNMENT PRINTING OFFICE : 1919

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In the Supreme Court of the United States.

OCTOBER TERM, 1913.

THE UNITED STATES, PETITIONER,
v.
TWENTY-FIVE PACKAGES OF PANAMA HATS, Maximo Castillo, claimant. } No. 257.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR PETITIONER, THE UNITED STATES.

STATEMENT.

The decree of the Court of Appeals sought to be reviewed affirmed, by a divided court, a decree of the District Court for the Southern District of New York, sustaining exceptions to the libel of the United States to forfeit certain hats imported from Panama into the United States.

THE QUESTION.

The one question in the case is, When the seller of foreign merchandise consigned to the United States fraudulently undervalues the same in the consular invoice, is such merchandise liable to forfeiture immediately on its arrival in the United States and

before any act done by the consignee to obtain possession of such goods, and even though he be innocent of the fraud?

The answer to this question depends on the construction of subsection 9 of section 28 of the tariff act of August 5, 1909 (36 Stat. 11, 97). This section is as follows, the particulars in which it amended section 9 of the act of June 10, 1890 (quoted on 9 hereof) being indicated by italics:

> That if any *consignor, seller,* owner, importer, consignee, agent, or other person or persons,
>
> *shall enter or introduce, or attempt to enter or introduce, into the commerce of the United States* any imported merchandise by means of any fraudulent or false invoice, affidavit, letter, paper, or by means of any false statement, written or verbal, or by means of any false or fraudulent practice or appliance whatsoever,
>
> or shall be guilty of any willful act or omission by means whereof the United States shall *or may* be deprived of the lawful duties, or any portion thereof, accruing upon the merchandise, or any portion thereof, embraced or referred to in such invoice, affidavit, letter, paper, or statement, or affected by such act or omission,
>
> such merchandise, or the value thereof, to be recovered from *such person or persons*, shall be forfeited, which forfeiture shall only apply to the whole of the merchandise or the value thereof in the case or package containing the particular article or articles of merchandise to

> which such fraud or false paper or statement relates; and such person or persons shall, upon conviction, be fined for each offense a sum not exceeding five thousand dollars, or be imprisoned for a time not exceeding two years, or both, in the discretion of the court.

THE PLEADINGS AND OPINIONS BELOW.

The libel asked the forfeiture of 25 packages of Panama hats, but the writ of error involved only 17 packages, which are described in the "Second cause of forfeiture," and in schedule B attached to the libel. (Rec., 4 to 7.)

The libel avers that Castillo, the claimant, is a hat dealer in New York City, to whom the 17 packages were consigned at divers times in 1910. In each consignment the invoice signed by the seller and produced by him before the American consul grossly understated the purchase price of the hats; the merchandise was duly shipped by the consignors, who also secretly sent truthful invoices to the consignee. The consignee made no formal claim or entry of the hats, which were placed in the Government warehouse, where they remained until the filing of the libel.

The libel then specifically avers that the consignors were thereby knowingly guilty of unlawful acts and omissions, by means whereof the United States might be deprived of the lawful duties accruing on said merchandise, and thereby attempted to introduce the said merchandise into the commerce of the United States. (Rec., 6.)

Exceptions were sustained to this second cause of forfeiture, and the decree entered thereon was affirmed by the majority of the Court of Appeals.

In the mind of the trial court the only question in the case was this:

Did the consignor, by the act of executing the false invoice and shipping the goods in pursuance thereof, either "enter or introduce, or attempt to * * * introduce," the hats "into the commerce of the United States?"

He understood "enter" here to be a technical word, meaning the transaction by which merchandise is gotten through the customs house (citing *United States* v. *A Cargo of Sugar*, 3 Sawy., 46), in which sense the goods had not been entered.

He held that while the hats had been introduced into the territory of the United States they had not been introduced into the commerce of the United States, and that there had been no attempt on the part of the consignor at such entry or introduction. (Rec., 9, 10.)

The majority of the Court of Appeals took the same view. The effect of their opinion is expressed in this quotation: "Until entry [used in its technical sense] is actually made or attempted the statute is inapplicable." (Rec., 14.)

Ward, circuit judge, in his dissenting opinion, said (Rec., 14):

> The amendment to the act of June 10, 1890, by subdivision 9 of section 28 of the act of August 5, 1909, was plainly intended to make

the customs system more effective. It seems to me that no foreign consignor or seller could do more than has been done in this case in the way of an attempt to introduce goods into the commerce of the United States by means of a fraudulent invoice. He sold or consigned the goods to a resident of the United States and filed with the United States consul at Panama, to be forwarded to the collector of customs at New York, invoices in which they were deliberately undervalued. This, in my opinion, made the goods guilty and subject to forfeiture.

THE CUSTOMS LAW.

Our customs duties, when *ad valorem*, are based upon the actual market value at wholesale of the imports in the principal markets of the country from which they have come.

It is therefore necessary to ascertain this value accurately, and while the question can not, of course, be left to the testimony of the importer alone, still the latter knows the cost of his goods and the foreign market value thereof, and common sense suggests that he furnish this information to the customs officers to aid in appraising his merchandise.

The value of such evidence has been recognized by Congress from the beginning. For instance, the act of July 31, 1789, to regulate the collection of duties, provided in section 13 that every person having goods in any ship arriving at any port of entry should make entry thereof with the collector, specifying the number of packages and the contents of each,

"together with an account of the nett prime cost thereof; and shall moreover produce to the collector the original invoice or invoices, together with the bills of lading," and the importer was also required to make oath that such invoice contained the "nett prime cost" of the goods. (1 Stat., 29, 39, 40.)

Not only has this requirement ever since remained in the law, but Congress soon provided for the testimony of the consignor by requiring him to swear to the truth of the invoices.

The various laws on the subject were codified in the so-called customs administrative act of June 10, 1890 (26 Stat., 131), a brief statement of the provisions of which will be helpful here:

For the purposes of the customs laws, merchandise is to be deemed the property of the consignee, and the holder of a bill of lading indorsed by the consignee, or if consigned to order by the consignor, is deemed the consignee. (Sec. 1.)

All invoices are to be in triplicate or quadruplicate, to be made in the currency of the country from whence imported, or, if purchased, in the currency actually paid, and are to be signed by the seller, manufacturer, owner, or agent. (Sec. 2.)

All such invoices, at or before the shipment of the merchandise, shall be produced to United States consular officer of the district where such merchandise was manufactured or purchased for export to the United States, and when so produced shall have indorsed thereon a declaration signed by the purchaser, seller, manufacturer, owner, or agent, setting

forth that the invoice is in all respects correct and true, the details of time and place and cost if purchased, or, if obtained otherwise than by purchase, the actual market price of the goods in the principal markets of the country whence exported, and that no different invoice has been or will be furnished to anyone. (Sec. 3.) Such invoice shall bear the attestation of said consular officer, and one copy shall remain in the consulate and another shall be transmitted to the collector of the port to which the goods are consigned. (Sec. 8.)

If the merchandise exceeds $100 in value it can not be admitted to entry without the production by the importer of such certified invoice unless the collector is satisfied that it was impossible to produce such invoice, in which event an affidavit must be made by the owner, importer, or consignee giving all the facts which should be stated in the invoice. (Sec. 4.)

Section 5 gives the forms of the declarations which must accompany all such invoices upon the entry of the merchandise, which forms provide in minute detail for the disclosure of all knowledge in the possession of the importer which will aid in ascertaining the dutiable value of the merchandise; and section 6 provides a heavy penalty for making any false statement in such a declaration.

Section 7 permitted the importer of merchandise acquired by purchase, in making his entry, to add to the cost or value given in the invoice such sum as would raise that figure to the actual market value of the goods at the time of exportation; but if the

appraised value exceeded the entered value additional duties were imposed, and if the undervaluation reached a certain percentage the goods were to be forfeited.

The section concludes with the provision that the duty shall not in any case be assessed upon an amount less than the invoiced or entered value.

By the act of August 5, 1909, this section was amended to permit the consignee in making his entry to deduct from, or to add to the purchase price in order to arrive at the actual market value of the goods and by providing that the duty should not be assessed upon an amount less than the *entered* value.

Section 8 provides that if goods are consigned by the manufacturer for sale in this country, the consignee, in addition to the certified invoice, shall present a statement from the manufacturer showing the details of the market value of such goods, and section 11 provides in minute detail the method of computing such market value from the actual cost.

Said sections 2 to 8, therefore, require from both the consignor and consignee a frank, honest, and complete disclosure of the actual cost and market value of the goods, and this disclosure is compelled as to all goods whether they are free or dutiable, and whether the duty be *ad valorem* or specific.

For the purpose of enforcing this disclosure, section 9 of the act of 1890, incorporating the substance of all previous acts upon the subject, provided for the forfeiture of the imported goods and for the punishment of the guilty consignee should he fail to make

the disclosure or attempt to make entry of his goods by any false means whatever.

This section reads (the expressions changed in the amendment of 1909 being indicated in italics):

> That if any *owner, importer, consignee, agent,* or other person
>
> *shall make or attempt to make any entry of imported merchandise* by means of any fraudulent or false invoice, affidavit, letter, paper, or by means of any false statement, written or verbal, or by means of any *false* or fraudulent practice or appliance whatsoever,
>
> or shall be guilty of any willful act or omission by means whereof the United States *shall* be deprived of the lawful duties, or any portion thereof, accruing upon the merchandise, or any portion thereof, embraced or referred to in such invoice, affidavit, letter, paper, or statement, or affected by such act or omission,
>
> such merchandise, or the value thereof, to be recovered from the person making the entry, shall be forfeited, etc.

While these disclosures by the importers are of greatest importance, and if truthfully made will render appraisement by customs officials unnecessary, Congress has been unwilling to rely alone on such evidence.

Section 10, therefore, makes it the duty of the appraising officers by all reasonable ways to appraise (any invoice or affidavit to the contrary notwithstanding) the actual market value of the merchandise at the time of its exportation to the United States.

Sections 11 to 18 of the act are devoted to providing the machinery for appraisement, the appointment of appraisers, and a method of enabling them to get at all available evidence, and of reviewing their decisions, finally, by a Federal court.

THE DECISIONS.

Inasmuch as the amendment of the act of 1890 was undoubtedly due to the construction placed thereon by the courts, an examination of those decisions is necessary to a proper understanding of the amendment.

In *United States* v. *One Silk Rug* (158 Fed. 974, decided January, 1908), the importer had purchased the rug abroad; the seller grossly undervalued the rug in the invoice, on which invoice the purchaser's agent innocently made the entry. Libel was filed to forfeit the rug under section 9 of the act of 1890. The Court of Appeals for the Third Circuit, refusing to adopt the construction contended for by the Government, held that, under the statute as it then stood, the fraud of the foreign consignor did not authorize a forfeiture. The court concluded its opinion thus:

> If, as contended, this construction embarrasses it [the Government] in the collection of its revenues, the remedy lies in legislative amndment.

In *United States* v. *Twenty Boxes of Cheese* (163 Fed. 369, decided April, 1908), the libel charged that the consignor had made a false invoice with intent to

have the United States deprived of certain duties when the goods should be entered at the port of New York. Following the preceding case, Chatfield, district judge, held that this did not authorize a forfeiture of the cheese.

In *United States* v. *Eighty-two Half-Boxes of Cheese* (164 Fed., 778, decided June, 1908), the same judge held that there was no other provision of the custom laws under which merchandise was subject to forfeiture for fraudulent acts on the part of the consignor alone.

In *United States* v. *Mescall* (164 Fed., 580, decided May, 1908), an assistant customs weigher was indicted for violating section 9 by reporting a false weight of the merchandise in order that it would agree with the weight mentioned in the invoice; the same judge quashed the indictment, holding that defendant was not included in the words "other person" as used in section 9, which he limited to the same class as "owner, importer, or agent," applying the rule *ejusdem generis*.

While this case was reversed by this court in November, 1909 (215 U. S., 26), section 9 had been amended pending that decision.

The same view of the law was taken in *United States* v. *One Trunk, McNally, Claimant* (171 Fed., 772), and *United States* v. *One Trunk, Gannon, Claimant* (175 Fed., 1012; affirmed 192 Fed., 913), but, while both of these cases construed the act of 1890, the decisions were rendered after the amendment of 1909, and hence are not material here.

Again the courts had construed the expression "make or attempt to make any *entry* of imported merchandise" as used in the acts which were codified in the legislation of 1890 as having a technical meaning; that is, the transaction of passing the goods through the customhouse, and that therefore forfeiture could not be had until some step had been taken toward this technical entry of the goods.

> *United States* v. *Baker*, 24 Fed. Cas. 953, 956 (1871, Blatchford, D. J.).
>
> *United States* v. *Cargo of Sugar*, 3 Sawyer, 46, 48 (1874).
>
> See also *United States* v. *Legg*, 105 Fed. (C. C. A., 2d Circuit), 933 (1901).

ARGUMENT.

It is thus apparent that at the convening of the special session of Congress in 1909, for the consideration of the tariff, the courts had decided that the statutes then in force did not authorize the forfeiture of imported merchandise because of any fraudulent acts on the part of the consignors thereof, nor until some action at the customs house had been taken by the consignee.

With these decisions before them, Congress amended section 9 as hereinbefore quoted. The plain purpose, as said by Judge Ward, "was to make the customs system more effective," and this was to be accomplished by preventing all fraudulent acts in connection with imports, whether committed by the consignor or by the consignee, and even

though committed before technical entry at the customs house.

We submit that these hats were forfeitable, first, because the consignors did attempt to and did introduce them into the commerce of the United States; second, because the consignors were guilty of acts which might deprive the United States of its duties on said hats.

I.

THE CONSIGNORS ATTEMPTED TO AND DID INTRODUCE THE HATS INTO THE COMMERCE OF THE UNITED STATES BY MEANS OF FALSE INVOICES.

As a prerequisite to forfeiture, the act of 1890 required that the owner, importer, consignee or agent "shall make or attempt to make * * * entry of imported merchandise," etc. Under the decisions above mentioned (which in 1909 stood unreversed) this meant the steps taken to pass the merchandise through the customs house; such steps could be initiated only by the consignee, for under section 1 of the customs administrative act he and he alone was recognized by the customs law as the owner of the goods. So that as the law stood in 1909 the consignor might indulge in all manner of false practices, which might be joined in by the consignee, but the United States was remediless until the consignee initiated his formal entry at the customs house. In other words, the two might plan to defraud the revenue, but there was no penalty if the consignee repented and ultimately filed a truthful document at

the customs house. And the Court of Appeals of the Third Circuit had suggested that if this construction embarrassed the Government in the collection of its revenues, the remedy lay with Congress.

When, therefore, Congress amended the statute as thus construed, the presumption is strong that it intended to change the statute in the particulars held to be obnoxious. This presumption is fortified when it is found that the only changes made in the verbiage of the statute relate to these very particulars. The words "consignor" and "seller" are added to the list of persons for whose fraudulent act the goods may be forfeited; and the expression "make entry of imported merchandise"—a thing which could not be done by the consignor—is accordingly stricken out and there is substituted in its stead "enter or introduce or attempt to enter or introduce into the commerce of the United States," a thing which is within the power of the consignor. In other words, the statute now forfeits the goods for the fraudulent act or practice of either the consignor or consignee, and that, in the case of the former, the moment the goods enter the United States.

But the holding of the courts below in this case gives to this amended statute precisely the same meaning as had been given to the old statute.

It can not be denied that in amending this section Congress intended to make some change in the law, and it is reasonable to presume that Congress intended by the change to make the law more effective. Pertinent here is the recent language of this court in

comparing original section 9 of the act of 1890 with earlier legislation for which it was substituted—

> Congress was broadening the scope of the legislation and meaning to reach other persons having something to do in respect to the entry beyond that which was done by the owner, importer, consignee, or agent, or else the words consignor and seller were a "meaningless addition."
>
> *United States* v. *Mescall* (215 U. S., 32).

A statute should be so construed as to effectuate the legislative intent, and when the language used is susceptible of either a narrow, technical, or a broad, popular meaning the courts must adopt that meaning which will accomplish and not defeat the intent.

> The rule does not exclude the application of common sense to the terms made use of in the act in order to avoid an absurdity which the legislature ought not to be presumed to have intended.
>
> *United States* v. *Hartwell* (6 Wall., 396).
>
> *American Security and Trust Co.* v. *D. C.* (224 U. S., 491).

It is only by disregarding this fundamental rule of construction that the courts below reached the conclusion that Congress, by the amendment of 1909, had added a few words to the statute but had made no change in its meaning.

They held, in effect, that under our customs system the consignor can not introduce merchandise into our commerce but that he can only prepare it for such introduction by the consignee; and that in this case

the consignors had not attempted to introduce the merchandise into the commerce of the United States.

This construction was reached only by giving to the expression added to the statute "introduce into the commerce of the United States" the technical meaning theretofore applied to "make entry" of the merchandise.

The new language can not be confined to the meaning of the old. The technical word "entry" has been abandoned and in its stead has been adopted a far broader expression.

The commerce of the United States is all inclusive, taking in both its domestic and its foreign commerce. The only qualification in the statute is that the goods shall be imported, and this is true of course when they have been brought to a port of the United States with intent to unlade.

United States v. *Arnold* (24 Fed. Cas., 868, Story, J.).

Flagler v. *Kidd* (78 Fed., 341, 344).

Interstate commerce of the United States continues from the receipt of goods by the common carrier to delivery to the consignee.

Coe v. *Errol* (116 U. S., 517).

Rhodes v. *Iowa* (170 U. S., 412).

Heyman v. *Southern Railway Co.* (203 U. S., 270).

The commerce of the United States is not less broad. This merchandise, purchased in Panama by a resident of New York City and shipped to and unladen there, has been introduced into such commerce of the United

States and is imported merchandise. If not in commerce, and that of the United States, what right has the purchaser to claim it here?

Clearly such introduction has been made by the consignor.

But it is not necessary that the consignor actually introduce the merchandise; it is enough if he *attempts* to introduce it into our commerce.

It is not clear just why the lower courts held that the consignors had not made such attempt in this case. It must be on the ground that the consignor had not started the technical customs house entry. This he could not do as *consignor*. Such a construction therefore will mean that it is legally impossible for the consignor to violate the statute.

Giving the statute a common-sense construction, it seems plain that Congress, in forbidding a fraudulent attempt on the part of a consignor, intended no such absurdity, but to prohibit the doing of fraudulent acts which were actually within his power.

Such acts are few in number. The consignor must make an invoice; he must declare it truthful before the consul and must deliver two copies to that officer, one to be sent to the collector of the port, and, finally, he must ship the goods. When these acts are performed, the consignor has done all he can and has tried by all means in his power to get the goods into the United States.

And if his invoice and oath be false, he has by such false means "attempted" to introduce his goods into the commerce of the United States.

Applying the principle of *United States* v. *Chavez* (228 U. S., 525), the courts will adopt the meaning intended by Congress.

Claimant in answer to this argument says that a consignor may make the physical entry at the customs house in the case where he has consigned the goods to his own order. But the fact is that in such cases he is acting as *consignee*, for under section 1 of the act of 1890 he has no standing as consignor.

Again, claimant suggests that this construction leaves no room for the operation of the provision of section 7 authorizing the consignee to add to or subtract from the invoice price in order to arrive at the real market value. The answer to this is simple. Sections 3 and 8 still require the invoice to be truthful, but if a person purchase either above or below the market value, he may in his entry show the actual market value upon which alone the duty should be paid.

II.

THE CONSIGNORS WERE GUILTY OF WILLFUL ACTS WHICH MIGHT DEPRIVE THE GOVERNMENT OF ITS DUTIES.

The clause of section 9 forfeiting merchandise for such acts seems to have been overlooked by the courts below.

The original section 9 provided for the forfeiture if the consignee should do any other willful act which *shall* result in a loss of duty, while the amended section authorizes the forfeiture if either consignor or

consignee do any act which *shall or may* result in such loss to the United States.

And it is to be noted—if it is possible to make a distinction between goods in the United States and those in its commerce—that this cause of forfeiture is not limited to goods entered or introduced, or attempted to be introduced, into the commerce of the United States, but applies to any foreign merchandise brought into the United States. These hats are foreign, and have been brought into the United States. If the consignors have in connection with them, done any willful act which *may* cause a loss of revenue, they are subject to forfeiture.

The false acts charged are the making of false invoices and producing them before the consul, and the shipping of the merchandise into the United States.

The importance of the invoice to the Government is apparent from the foregoing résumé of the customs laws. The duty on the hats being *ad valorem* (par. 422 of the act of 1909), it is essential to ascertain their market value in the country whence imported.

The invoice gives the appraiser a starting point in estimating this value. And it must be the starting point of any fraud on the customs revenues; for if that invoice is correct, the United States can not be defrauded, because it will then state the exact sum on which the duty must be assessed. Prior to 1909, by the terms of section 7, the duty could not be assessed on any sum less than the invoiced value.

So that it was an impossibility to defraud the United States without the aid and connivance of the consignor. And this is still substantially true, for, while under section 7 as amended in 1909, if the consignee paid more for the goods than their market value, he may deduct from the invoice in making his declaration, such deduction will put the appraiser on guard and make him too alert to be imposed on.

The truth is that the willfully false invoice is always the beginning of a fraud on the Treasury, which fraud can only fail of consummation because of a change of heart of the importer, or because of the vigilance of the appraiser. It inevitably follows, therefore, that the making of a false invoice on the part of the consignor is an act which *may* and probably will deprive the Government of its revenue.

The decree below should be reversed, with instructions to overrule the exceptions to the libel.

Respectfully,

JESSE C. ADKINS,
Assistant Attorney General.

SEPTEMBER, 1913.

○

No. 257.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1913.

THE UNITED STATES,
Petitioner,

vs.

TWENTY-FIVE PACKAGES OF PANAMA HATS,
MAXIMO CASTILLO,
Claimant.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR CLAIMANT-RESPONDENT.

C. G. BURGOYNE, 72 to 78 Spring Street, New York.

In the Supreme Court of the United States,

OCTOBER TERM, 1911.

THE UNITED STATES, Petitioner, vs. TWENTY-FIVE PACKAGES OF PANAMA HATS, MAXIMO CASTILLO, Claimant.	No. 257.

BRIEF FOR CLAIMANT, RESPONDENT.

Statement.

The question at issue—assuming the writ of error here reviewed on writ of *certiorari* properly lies—is whether merchandise in General Order is liable to forfeiture.

There may be some doubt as to whether Judge HOUGH's order (Tr. R., 10) in the district court finally dismissing the libel as to merchandise in General Order is a final judgment or decree within the meaning of the act regulating appeals to the circuit court of appeals. The view may be taken that said order was a final decree as to all matters determined by it, and that its finality was not affected by the fact that there was left to be determined by the libel a further matter which was severable (Hill vs. Chicago & Evanston R. R. Co., 140 U. S., 52). As the opinion below states, however (Tr. R., 13), the question of practice was not pressed for the reasons given.

The "second amended libel" here involved, alleges two causes of forfeiture. In the "second cause of forfeiture"

(Tr. Rec., 7) it is alleged that certain Panama hats were "shipped to and purchased by" one Maximo Castillo (the Claimant). The hats are more specifically described in schedule B (Tr. R., 7), where they are referred to as "Merchandise in General Order."

General Order goods have thus been defined:

> "A 'General Order" is an order whereby the Collector allows the unloading of goods and takes possession of them before any entry of them is made by the individual owners or consignees" (*The Egypt*, 25 Fed. Rep., 320, 332).

R. S., 2954, authorizes the Secretary of the Treasury at his discretion to lease such warehouses as he deems necessary for the storage of unclaimed goods. The act of June 22, 1874, C. 391, Sec. 24, 18 Stat., 191, provides that no General Order store shall be established without the authority of the Secretary of the Treasury and authorizes him to make such regulations as he may deem necessary for the conduct and management of the bonded warehouses, General Order stores, and other depositories of merchandise throughout the United States. R. S., 2989, also authorizes the Secretary of the Treasury to establish rules and regulations for the execution of the various provisions relating to warehouses. The Customs Regulations of 1908, established by the Secretary of the Treasury, provide (Art. 1087) that:

> "All merchandise remaining on board any vessel and for which no delivery permit has been received by the discharging inspector, at the expiration of the period allowed by law for the discharge of the cargo, will be sent by the inspector to a General Order warehouse." * * *

Art. 1088 provides that:

> "At the expiration of forty-eight hours from final discharge, no permit for delivery having been received by the inspector, the Collector shall send the merchandise to the General Order stores."

Art. 1089 provides that the storage shall be at the expense of the owner or consignee and at ordinary rates. Art. 1091 gives the form of the permit, signed by the collector when unclaimed merchandise is taken possession of by him. Art. 1902 provides :

> "At any time within one year after importation merchandise so taken possession of may be claimed by the consignee and due entry made thereof. But if not so entered within one year, it should be sold at public auction at the next ensuing regular sale, provided, that at any time previous to being sold, it may be entered for consumption or warehouse and withdrawn upon payment of duty and expenses."

This regulation is based upon Treasury Decisions 18499, 18929, 21127.

Stated in another way merchandise in General Order is merchandise for which no entry has ever been made and which has never been entered or introduced into the commerce of the United States, but lies for all intents and purposes unclaimed in the General Order stores or warehouses, with the privilege to the consignee of claiming the merchandise within one year after importation and making due entry thereof either within that time or at any time previous to the sale of the merchandise at public auction.

The proceedings in the district court arose on exceptions to the "second amended libel" in so far as it related to the merchandise set forth in schedule B—"The Merchandise in General Order." The exceptions were sustained (Tr. R., 8), and the order sustaining the exceptions (Tr. R., 10) was subsequently affirmed by the majority of the circuit court of appeals for second circuit.

The issue may be re-stated in this language of the court below :

> "The contention on the part of the Government is that the goods of a consignee against whom no charge of wrongdoing is made may be forfeited because of the fraud and undervaluation of the consignor, before they are entered into the commerce of the United States. It

is not alleged that Castillo, the claimant and consignee, participated in or knew of the alleged false invoice. The parties charged with making the false and fraudulent invoice in a foreign country are the 'consignors and sellers'. Because of their fraud it is contended that the goods may be forfeited the moment they arrive in the United States and before they are entered or an attempt to enter them is made."

The statutory provisions most directly involved are Subsections 7 and 9 of Section 28 of the Tariff Act of August 5th, 1909. The libel was based on Sub-section 9, providing:

"That if any consignor, seller, owner, importer, consignee, agent or other person or persons, shall enter or introduce, or attempt to enter or introduce, into the commerce of the United States any imported merchandise by means of any fraudulent or false invoice, affidavit, letter, paper, or by means of any false statement, written or verbal, or by means of any false or fraudulent practice or appliance whatsoever, or shall be guilty of any willful act or omission by means whereof the United States shall or may be deprived of the lawful duties, or any portion thereof, accruing upon the merchandise, or any portion thereof, embraced or referred to in such invoice, affidavit, letter, paper, or statement, or affected by such act or omission, such merchandise, or the value thereof, to be recovered from such person or persons, shall be forfeited, which forfeiture shall only apply to the whole of the merchandise or the value thereof in the case or package containing the particular article or articles of merchandise to which such fraud or false paper or statement relates; and such person or persons shall, upon conviction, be fined for each offense a sum not exceeding five thousand dollars, or be imprisoned for a time not exceeding two years, or both, in the discretion of the court" (36 U. S. Stat., Part 1, p. 97).

Subsection 7 of Section 28 provides:

"That the owner, consignee or agent of any imported merchandise may, at the time when he shall

make and verify his written entry of such merchandise, but not afterwards, make such addition in the entry to or such deduction from the cost or value given in the invoice or *pro forma* invoice or statement in form of an invoice, which he shall produce with his entry, as in his opinion may raise or lower the same to the actual market value or wholesale price of such merchandise at the time of exportation to the United States, in the principal markets of the country from which the same has been imported ; * * * "

Subsection 2 provides that invoicing of imported merchandise shall be made out in the manner prescribed, " and signed by the person owning or shipping the same, if the merchandise has been actually purchased, or by the manufacturer or owner thereof, if the same has been procured otherwise than by purchase, or by the duly authorized agent of such purchaser, seller, manufacturer or owner."

Subsection 3 provides for the sworn declaration before a consular officer of the United States by the *purchaser*, *seller*, *manufacturer*, *owner* or *agent*.

ARGUMENT.

There has been no attempt to enter or introduce into the commerce of the United States merchandise in General Order within the meaning of Subsection 9 of Section 28 of the Tariff Act of August 5th, 1909.

What constitutes an " attempt to enter " imported merchandise ? Sebsection 4 of Section 28 of the Act of August 5, 1909, provides :

> " That, except in case of personal effects accompanying the passenger, no importation of any merchandise exceeding one hundred dollars in

> value shall be admitted to entry without the production of a duly certified invoice thereof as required by law, or of an affidavit made by the owner, importer or consignee, before the collector or his deputy, showing why it is impracticable to produce such invoice ; and no entry shall be made in the absence of a certified invoice, upon affidavit as aforesaid, unless such affidavit be accompanied by a statement in the form of an invoice, or otherwise, showing the actual cost of such merchandise, if purchased, or if obtained otherwise than by purchase, the actual market value or wholesale price thereof at the time of exportation to the United States in the principal markets of the country from which the same has been imported; which statement shall be verified by the oath of the owner, importer, consignee or agent desiring to make entry of the merchandise, to be administered by the collector or his deputy * * *."

Subsection 5 of Section 28 provides that one of several declarations set forth in full in the body of this subsection :

> " Shall be filed with the collector of the port *at the time of entry* by the owner, importer, consignee or agent, which declaration so filed shall be duly signed by the owner, importer, consignee, or agent before the collector or before a notary public or other officer duly authorized by law to administer oaths and take acknowledgments * * * ."

The way and manner of entering merchandise not personal effects and exceeding one hundred dollars in value into the commerce of the United States and the scope and meaning of the entry, referred to in Sub-section 9, is thus made plain.

What is prerequisite to such entry is defined by statute and the decisions. In *United States vs. Cargo of Sugar*, 3 Saw., 46, 25 Fed. Cas., 288, cited in the opinions below, the word " entry " as used in Section 1 of the Act of March 3, 1863, was construed to include the series of acts done by the importer at the custom house necessary to the introduction of

his merchandise into the United States in compliance with the forms of law. The court said :

> " What, then, is an entry ? The term entry in the acts of congress is used in two senses. In many of the acts it refers to the bill of entry : the paper or declaration which the merchant or importer in the first instance hands to the entry clerk. In other statutes it is used to denote, not a document, but a transaction : a series of acts which are necessary to the end to be accomplished, viz, the entering of the goods. In the latter sense it is used in this statute. The language is : ' If any owner or consignee shall make or attempt to make an entry by means of false documents, false invoice or any other false or fraudulent appliances.' It is the fraudulent use of means in the attaining of an object and accomplishing of a result, to wit, the entry of the goods which the statute here denounces. The acts which accomplish this result, and which, taken together, constitute an entry, must have a beginning and and end. *There is a moment when the entry is attempted to be made or begun :* there is a moment when it is accomplished. The entry may be said to be commenced, or *attempted, when the merchant presents his declaration or bill of entry.* When this bill of entry has gone to the requisite clerks' desks, when accomplished by the certificate of the consul, the invoice and and the oath, it is delivered to the collector and accepted by him, then the goods may, in a just sense, be said to be admitted to entry and the entry to be accomplished. If in the performance of any of those acts, and as a means of making the entry, any false document, appliance or practice is resorted to, then this statute applies and the goods so entered are forfeited to the United States."

To the same effect see *United States vs. Legge*, 105 Fed. Rep., 930, decided by the C. C. A., Second Circuit.

It is evident that the Government seeks to stretch the " series of acts " referred to in these decisions as necessary to constitute an entry so as to embrace " the preparation, production and verification of the invoice by the seller or con-

signor" before a consular officer in a foreign country. In *United States vs. Mescall*, cited in the Petitioner's brief (pp. 11 and 13) it was not contended that an entry of goods, under the Administrative Act of 1890 anyway, embraced anything more than "the entire transaction *from the time the vessel enters a port* until the imported obtains an entrance of the goods into the body of merchandise in the United States."

The inferences most favorable here to the Government, as the trial court observes, are that the "shippers of these hats executed fraudulent (*i. e.* undervalued) consular invoices, and sent one or more of them to Castillo and also shipped the hats to Castillo" (Tr. Rec., 14 and 15). Assuming all this to be true for argument's sake, *i. e.*, that preparations were made in a foreign country by some unknown consignor in anticipation of the commission of an offense or of an attempt to commit an offense, where is the overt act essential either to the offense or to the attempt to commit an offense? (*Keck vs. United States, 172 U. S., 434.*)

In *United States vs. One Pearl Chain, 139 Fed. Rep., 513*, it was held by the C. C. A., second circuit, that mere intent to smuggle goods will not work a forfeiture under the laws of the United States. Though goods are brought in with intent to smuggle them, they may not be seized while the persons importing them may yet change their minds and observe the necessary formalities. In the language of the court "in other words mere intent without act will not work a forfeiture." It is elementary to say that the intent must be followed by some act of execution which would result, unless interrupted by some outside agency in the commission of an offense. The existence of false and fraudulent invoices, conceding them to be false and fraudulent, is comparable with the purchase of a gun with a design to commit murder, or the purchase of poison with the same intent. These are simple illustrations of what may be considered to be in the nature of preliminary preparations. They do not advance the party beyond the sphere of mere intent. In *People vs. Youngs, 122 Mich., 292*, Justice MONTGOMERY, now Chief Justice of the United States court of customs appeals, writing the opinion, it was held that one could not be convicted of an attempt to enter and break into a dwelling merely because he had agreed with another to do

so, and met him at a saloon at the appointed time with a revolver and slippers to be used in the house, and went into a drug store and purchased some chloroform to use, being arrested when he came out. In *People vs. Murray, 14 Cal., 160*, the defendant was indicted for an attempt to contract an incestuous marriage, and was found guilty. From the evidence it appeared that he intended to contract such marriage, that he eloped with his niece for that purpose, and requested a third person to get a magistrate to perform the ceremony. Upon an appeal the judgment was reversed. Chief Justice FIELD, afterwards of this Court, delivering the opinion of the court, said:

> "It (the evidence) shows very clearly the intention of the defendant, but something more than mere intention is necessary to constitute the offence charged. Between preparation for the attempt and the attempt itself there is a wide difference. The preparation consists in devising or arranging the means or measures necessary for the commission of the offence; the attempt is the direct movement towards the commission after the preparations are made: * * * but until the officer was engaged, and the parties stood before him, ready to take the vows appropriate to the contract of marriage, it cannot be said, in strictness, that the attempt was made. The attempt contemplated by the statute must be manifestly by acts which would end in the consummation of the particular offence, but for the intervention of circumstances independent of the will of the party."

So in the recent case of *United States vs. One Trunk*, 171 Fed. Rep., 772, affirmed in 184 Fed. Rep., 317, the trial judge very clearly defines what constitutes an "attempt to make entry":

> "The second consideration is whether, as merchandise, the trunk is forfeited because Mrs. McNally 'attempted to enter' it. As I understand it, one 'attempts' a crime where, with an attempt to complete the

crime, he does any part of the acts which together constitute the complete crime. I do not understand that anything which leads up to, but does not itself constitute a part of, a crime, can alone constitute an attempt to do it. It is often a matter of some casuistry as to just where the series of acts actually begins which, when completed, would constitute a crime; for by no means all those things which are necessary conditions to the commission of crime are a part of the crime itself. In this case it is no doubt a necessary condition to the entry of the goods that Mrs. McNally should take out the invoices in Paris and send one to the customs house, because that was a condition of entry; but it was not, on that account, necessarily a part of the entry. In my judgment the entry does not begin, at the earliest, until the owner, after the goods reached this country, begins that series of acts through which, by application to the customs officials, he gains possession of his goods. If this is so, the claimant changed her intent before she performed any of the series of acts which, when completed, would have constituted such entry; and so she made no attempt." (171 Fed. Rep., 774).

Upon the question of introduction or attempted introduction into the commerce of the United States under the law of 1909, the language of the trial judge is persuasive (Tr. R., 9 and 10):

"It is to me equally plain that the goods have not been introduced into the commerce of the United States. It is true that they have been introduced into the United States, that is to say, they are within the territorial jurisdiction of our country, but that is not enough (see U. S. vs. 4 Bottles, 90 Fed. Rep., 720).

"Not only must there be an introduction into the country but an introduction into the commerce of the country. The primary and simplest meaning of commerce is an interchange of commodities and *it is impossible that goods can be introduced into commerce until after they are out of general order.*" (Italics ours).

The government theory of interpretation is based upon the amendatory language inserted in the Act of 1909 and in this connection the learned Assistant Attorney General cites certain cases beginning on page 10 of his brief. The cases of *United States vs. One Silk Rug* (158 Fed., 974, decided January, 1908), *United States vs. Twenty Boxes of Cheese* (163 Fed., 369, decided April, 1908), *United States Eighty-two vs. Half-Boxes of Cheese* (164 Fed., 778, decided June, 1908), and *United States vs. Mescall* (164 Fed., 580, decided May, 1908) differ from the case at bar in this important respect—they cover goods which had been *actually entered* and did not affect the status of goods in General Order. The cases of *United States vs. One Trunk, McNally Claimant*, and *United States vs. One Trunk, Gannon Claimant*, related to the status of passengers' baggage, where it appeared that the traveler or importer herself accompanying the baggage had sworn to a false invoice value before the American consul. In each case the fraudulent invoice was not used in making entry but a corrected invoice was. As our learned adversary observes, these decisions were rendered after the amendment had been inserted in the law of 1909 (Brief, p. 11) and it is impossible, therefore, that they could have been in legislative contemplation.

It is conceivable that the new language with respect to *introducing* or *attempting to introduce* imported merchandise into the commerce of the United States, found in Sub-Section 9 of Section 28, was inserted in view of the language of the trial judge in the Mescall case so as to broaden the scope of the section to include a customs weigher, even though it subsequently transpired after the passage of the Act of 1909 that Section 9 of the old Act as construed by this Court (*United States vs. Mescall*, 215 U. S., 26) was sufficiently comprehensive as it stood. This is something that Congress, of course, could not surely anticipate.

So it may be conceded that *United States vs. One Silk Rug* had something to do with the interpolation of the words *consignor* and *seller* in the new law. But this concession by no means carries with it the implication that there can be a forfeiture under the provisions of the Act of 1909 any more than under the Customs Administrative Act of 1890 in the absence of an attempted entry or introduction so well defined in *United States vs. One Trunk*, *supra*, and by the trial judge

in the case at bar. Neither is it to be implied that there can be any forfeiture under the new law in the absence of a *guilty scienter and intent* on the part of some person after the goods reached this country, which is the earliest point of time at which an attempted entry or introduction can begin. Such is the trend of all the decisions, with which presumably Congress was familiar.

The learned Assistant Attorney General argues in substance (Brief 17), in support of his contention, that the consignor has in this instance made the only attempt to introduce into our commerce possible for him to make, that he has no legal standing as *consignor* to attempt to make a technical customs house entry, and that in such cases "he is acting as consignee for, under Section 1 of the Act of 1890, he has no standing as consignor" (Brief 18).

> "The consignor must make an invoice; he must declare it truthful before the consul and must deliver two ,copies to that officer, one to be sent to the collector of the port, and, finally, he must ship the goods. When these acts are performed, the consignor has done all he can and has tried by all means in his power to get the goods into the United States" (Brief 17).

But if it be true that the consignor as such has no legal standing for the purposes of making or attempting to make a custom house entry, then it is equally true that the consignor has no standing as such to make the necessary invoice and declaration required by the consul. Subsections 2 and 3 of Section 28 of the Act of August 5th, 1909, which, rather than the Act of 1890, governs this case, does not employ the term "consignor" any more than do Subsections 4 and 5 in providing for custom house entry. As *consignor*, nobody can make out an invoice and swear to it before a consul. As *consignor* nobody can make or attempt to make a custom house entry. And yet Subsection 9 of Section 28 provides that if any "consignor, seller, owner, importer, consignee, agent or other person or persons" shall enter or introduce or attempt to enter or introduce, etc. No doubt the terms employed in Subsection 9 are or may

be synonymous. The consignor, seller, owner or importer seemingly may be and frequently is one and the same person. The consignor as owner may make out the invoices and the necessary declarations before the consul. The consignor as owner may make or attempt to make the custom house entry. It is entirely possible for a consignor or owner or seller to make an attempt to enter merchandise into the commerce of the United States, especially goods sold for delivery, duty paid, in the United States.

Such was the case of *United States vs. Citroen*, decided by this Court in February, 1912 (223 U. S., 407). There certain pearls for a necklace were sold in Paris by Citroen to Mrs. Leeds for delivery at Newport. If Citroen had caused to be made a false and fraudulent invoice undervaluing the pearls, and his brother, acting as his agent, had made use of such invoice upon entry, the brothers and the pearls would plainly have been in jeopardy under the provisions of Subsection 9 ; but if, after the pearls had been brought within the territorial jurisdiction of the United States, and prior to any attempted entry or introduction into the commerce of the United States, there had been, as in the case of McNally Claimant and Gannon Claimant, a *locus penitentiæ*, there clearly would have been no violation of the statute.

Let us invoke a simple test which meets the government theory in this case at every point : Suppose the consignor or seller in the case at bar had conceived a plan to make a fraudulent entry of Panama hats into the commerce of the United States and, pursuant to that plan, had caused the preparation and verification of a false and fraudulent invoice before a consular officer abroad. Suppose, as not infrequently happens, he had himself brought the merchandise within the territorial jurisdiction of the United States. The exigencies of the situation drive the learned Assistant Attorney General into the position of contending, in effect, that, if the consignor or seller had changed his mind before observing the necessary formalities of entry, as pointed out in the case of smuggled goods, *United States vs. One Pearl Chain, supra*, the hats would, notwithstanding, be liable to seizure under the provisions of Sub-section 9.

In answer to our inquiry as to what force and effect the Gov-

ernment would accord to the explicit provisions of Sub-section 7 or Section 28 permitting addition upon entry to make market value the rejoinder is made (Brief 18):

> "The answer to this is simple. Sections 3 and 8 still require the invoice to be truthful, but if a person purchase either above or below the market value, he may in his entry show the actual market value upon which alone the duty should be paid."

This position quite loses sight of the reasoning of the district judge (Tr., R., 9):

> "It is observable that this penal statute lays down the same measure for a forfeiture of the goods and for the conviction of a person. If any goods are subject to forfeiture, there must be some person who is subject to fine or imprisonment or both. This requires a very strict construction of the provisions of the statute. It also renders unnecessary any pursuit of the thought that the goods themselves are the subject of claim, or are (so to speak) tainted with fraud in such wise as to become forfeited to the United States by a proceeding *quasi in rem*. It must be asserted and proved that some person did the act or acts obnoxious to the statute by force of which the goods concerning which he acted became forfeit.
>
> "This amended libel does not allege any such acts against Castillo, but does seek to allege them against Castillo's unknown consignors."

Surely the construction contended for by the Government involves a radical departure from the fixed principles of interpretation applied to statutes of this character.

In the case at bar, as appears from schedule B (Tr., Rec., 11), the hats were brought within the territorial jurisdiction of the United States in April, May and June, of 1910. The "second amended libel" was not filed until May 16, 1911 (Tr., Rec., 11). For over two years these hats, with the inevitable consequent deterioration, were in the government custody in spite of diligent effort to secure final action. The possibility of sub-

jecting an innocent purchaser, to whom, for any reason, a foreign shipper might elect to forward a false invoice, even though the purchaser himself repudiated it, to long delay with the certainty of the forfeiture of his property, if the falsity of the *unused* consular invoice be established, is repugnant to every principle of justice. And yet this is the effect of the construction contended for by the Government. For the innocent purchaser no redress and for the consignor no *locus penitentiæ*.

Until the consignor, seller or owner actually enters merchandise or attempts to enter or introduce it, whatever may have been his original intent, how can it definitely be said that he would or would not adopt or make use of a false or fraudulent consular invoice. In the case of *United States vs. One Trunk, supra, McNally, Claimant, and Gannon, Claimant, preparations* for an attempt were made but the *attempt* itself was *not*.

The learned Assistant Attorney General further states :

> " The commerce of the United States is all inclusive, taking in both its domestic and its foreign commerce. *The only qualification in the statute is that the goods shall be imported*, and this is true of course when they have been brought to a port of the United States *with intent to unlade* " (Brief, 16 ; italics ours).

In other words, as the district judge observes (Tr. Rec., 9) :

> " The Government's proposition is that, by reason of the execution of the fraudulent consular invoice in a foreign country, the goods covered by that invoice became subject to forfeiture the moment they had arrived within the territorial jurisdiction of the United States."

But is it established that the goods have in fact " been brought to a port of the United States with intent to unlade ? " As the court below said :

> " It is not enough that it was brought within the jurisdiction of the United States. No presumption of an intent to enter can be predicated of that fact. It may well be that the owner of such merchandise, after

> holding it in 'General order' until he can ascertain where the best market can be found, intends to ship it to a foreign country" (Tr., Rec. 14).

In point of fact it is a matter of common knowledge that importers frequently export goods which have been brought within the limits of a port of entry to some foreign port, in which event the goods never enter the commerce of the United States, and the importers are not liable for duties. This is recognized by statute (R. S., 2989).

In point of fact every one of the invoices covering the merchandise in General Order set forth in Schedule B are marked "*In transit to London, option New York.*" Indeed a misapprehension of the legal status of General Order goods, which *only* are involved in this proceeding, seems to characterize our learned adversary's brief.

That the contention of the respondent, sustained by the courts below, is the correct one finds confirmation in the amendatory language of the new tariff law just passed. The House reported and passed, under Section 3, which is devoted to the amendment of the customs administrative statutes, this provision as a part of Paragraph B:

> "That for the purposes of this act bringing or causing merchandise to be brought within the territorial limits of the United States shall be construed to be an attempt to enter or introduce the same into the commerce of the United States."

Such a provision would have met the facts in the present case. The Senate, however, struck out this language and, in lieu thereof, inserted this provision, which was adopted by the conference between the two Houses, and appears as a part of Section 3, Par. H, of the law approved October 3, 1913, to wit:

> "That the arrival within the territorial limits of the United States of any merchandise consigned for sale and remaining the property of the shipper or consignor, and the acceptance of a false or fraudulent invoice thereof by the consignee or the agent of the

consignor, or the existence of any other facts constituting an attempted fraud, shall be deemed, for the purposes of this paragraph, to be an attempt to enter such merchandise notwithstanding no actual entry has been made or offered."

Par. H corresponds to Sub-section 9 of Section 28 of the Act of August 5th, 1909, here drawn in question. Such a provision does not meet the facts in the present case, however, because, as the libel discloses, Castillo was the purchaser of the hats covered by these proceedings. It is his property which the United States seeks to forfeit. In the entire absence of any allegation, as the district judge points out "that Castillo ever did anything either in the way of preparing said invoice or of procuring the execution of the same," the United States contends for a construction which would make the receipt by him of an invoice sent from Columbia a fraud on his part, though he made no use of it, and though he may have had no knowledge of it. The learned Assistant Attorney General thus frankly propounds the issue on the first page of his brief:

> "The one question in the case is, When the seller of foreign merchandise consigned to the United States fraudulently undervalues the same in the consular invoice, is such merchandise liable to forfeiture immediately on its arrival in the United States and before any act done by the consignee to obtain possession of such goods, and even though he be innocent of the fraud?"

It is submitted that the order of the court below should be affirmed.

Respectfully,

ALBERT H. WASHBURN,

Proctor for the Claimant, Respondent.

COMSTOCK & WASHBURN,

Of Counsel.

UNITED STATES *v.* TWENTY-FIVE PACKAGES OF PANAMA HATS.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 257. Argued October 30, 1913.—Decided December 1, 1913.

The expression—to attempt to introduce into the commerce of the United States—includes more than to attempt to enter merchandise, and as used in the act of August 5, 1909, c. 6, 36 Stat. 11, 97, it covers fraudulent invoices made by consignors in foreign countries.

As statutes have no extraterritorial operation, a consignor making a fraudulent invoice in a foreign country cannot be punished therefor, but the goods being within the protection and subject to the commercial regulations of this country can be subjected to forfeiture for the fraudulent attempt to introduce them.

While punishment for crime and forfeiture of goods affected by the crime are often coincident, they are not necessarily so, and inability to reach the criminal is a reason for subjecting the goods to forfeiture.

A foreign consignor is charged with knowledge of the regulations of the United States in regard to importation of goods and their disposition in case they are not called for after removal from the vessel.

When goods are unloaded and placed in General Order they are actually introduced into the commerce of the United States within the meaning of the statute intending to prevent fraud on the customs.

195 Fed. Rep. 438, reversed.

THE facts, which involve the construction of the tariff laws of the United States in regard to attempted introduction into the commerce of the United States of goods fraudulently undervalued, are stated in the opinion.

Mr. Assistant Attorney General Adkins for the United States.

Mr. Albert H. Washburn for the respondent.

MR. JUSTICE LAMAR delivered the opinion of the court.

This was a proceeding to forfeit, for fraud of foreign consignors, goods not technically entered at the New York Customs House, but unloaded from the ship and stored in General Order. The libel charges that Castillo & Co. were engaged in buying and selling Panama hats shipped to them by merchants from foreign ports. These consignors, as required by law, (June 10, 1890, c. 407; 26 Stat. 131), delivered to the American Consular Agent, at the point of shipment, three sets of invoices showing the value of the property intended for importation into the United States. One of these invoices was retained by that officer, one was sent to the Collector of the Port at New York, and the third was delivered to the consignor and by him forwarded to the consignee, Castillo & Co. All the provisions of the law were complied with, except that the consignors falsely and fraudulently undervalued the merchandise. The goods arrived in New York during April, May and June, 1910, but were not called for by the consignee. They were accordingly put in General Order by virtue of Customs Regulations (§§ 1087, 1088; 1902, Rev. Stat. 2954, 2989) whereby the Collector takes possession of goods unloaded but unclaimed. They are then stored in a General Order warehouse, the consignee having the right at any time within 12 months to withdraw them and make due entry therefor. If not so entered within the year, the merchandise must be sold at public auction.

The libelled goods not having been called for, the Collector, in May, 1911, caused proceedings to be instituted to have them forfeited under the provisions of § 9 of the Tariff Act of August 5, 1909, c. 6, 36 Stat. 11, 97, which declares "That if any consignor, seller, owner, importer, consignee, agent, or other person or persons, shall enter or introduce, or attempt to enter or introduce, into the commerce of the United States any imported

merchandise by means of any fraudulent or false invoice, . . . or shall be guilty of any willful act or omission by means whereof the United States shall or may be deprived of the lawful duties, . . . such merchandise, or the value thereof, to be recovered from such person or persons, shall be forfeited, . . . and such person or persons shall, upon conviction, be fined—or imprisoned—or both, in the discretion of the court."

Maximo Castillo, as claimant, filed exceptions to the libel on the ground that the merchandise was not subject to forfeiture because there had been no entry of the goods, contending that placing them in General Order was not even an attempt to introduce them into the commerce of the United States, inasmuch as the owner might, during the year, direct them to be forwarded to a foreign country without payment of a duty here. This contention was sustained by the District Judge. That judgment was affirmed by the Circuit Court of Appeals (195 Fed. Rep. 438) and the case is here on writ of certiorari.

The prior Tariff Act (26 Stat. 131) provided for the forfeiture of the goods "if any owner, importer, consignee, agent or other person shall make or attempt to make any entry of imported merchandise by means of any fraudulent or false invoice." In several cases arising under that act it was held that the language used did not cover the case of fraud by the consignor, nor could the goods be forfeited for the wrongful conduct of any person if the act preceded the making of the documents or taking any of the steps necessary to enter the goods. *United States* v. *646 Half Boxes of Figs*, 164 Fed. Rep. 778 (1908); *United States* v. *One Trunk*, 171 Fed. Rep. 772 (July, 1909). Under the statute, as thus construed, there was no penalty for the grossest fraud on the part of the consignor, notwithstanding the fact that his invoice valuation was of great importance in determining true value, as a basis for collecting the duty. And even if the consignor was

also consignee it had been held that there was a *locus pœnitentiæ* so that he might, before entry, substitute a true for a false invoice and thus escape a forfeiture.

In order to close these loopholes and to make the act more effective Congress, on August 5, 1909 (36 Stat. 11, 97), changed the law so as to increase the number of persons whose fraud should be punished. It also enlarged the scope of conduct for which the goods should be forfeited. Instead of punishing only for the fraud of the "owner, importer, consignee and other persons," as under the act of 1890, provision was made for forfeiture for fraud of the "consignor or seller." Instead of punishing only for entering or attempting to enter on a fraudulent invoice, it punished an attempt by such means "to introduce any imported merchandise into the commerce of the United States" This latter phrase necessarily included more than an attempt to enter, otherwise the amendment was inoperative against the consignor against whom it was specially aimed, for he does not, as such, make the declaration, sign the documents, or take any steps in entering or attempting to enter the goods. When he makes the false invoice in a foreign country there is no extraterritorial operation of the statute whereby he can be criminally punished for his fraud. But when the consignor made the fraudulent undervaluation in the foreign country and on such false invoice the goods were shipped and arrived consigned to a merchant in New York, the merchandise was within the protection and subject to the penalties of the commercial regulations of this country even though the consignor was beyond the seas and outside the court's jurisdiction.

It was argued that the goods could only be forfeited for the same acts that would support an indictment, and inasmuch as the consignor could not be prosecuted here for making a false invoice in a foreign country, neither could the goods be forfeited for the same conduct in the

same place. But while punishment for the crime and forfeiture of the goods will often be coincident penalties, they are not necessarily so, nor is there any inconsistency in proceeding against the *res* if the wrongdoer is beyond the jurisdiction of the court. The very fact that the criminal provision of the statute does not operate extra-territorially against the consignor, would be a reason why the goods themselves should be subjected to forfeiture on arrival here. Cf. *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347, 356; *United States* v. *Nord Deutscher Lloyd*, 223 U. S. 512. The consignor's absence would not relieve the goods from the liability to be forfeited. He must be treated as having made the shipment with a knowledge that they could not remain in the vessel (Rev. Stat. § 2880), and that if, after being unloaded, they were not called for, they would be stored in General Order, there to remain, free from the burden of any state legislation and within the protection of the commerce clause of the Constitution. The foreign consignor is charged with knowledge that if goods stored in such warehouse were not called for within the year they were to be sold at public outcry; or if, during that period, they were taken out for shipment to a foreign port, they would start from a place of storage within the territory of the United States and move thence in a channel of its commerce. So that in the present case when the goods, fraudulently undervalued and consigned to a person in New York, arrived at the port of entry there was an attempt to introduce them into the commerce of the United States. When they were unloaded and placed in General Order they were actually introduced into that commerce, within the meaning of the statute intended to prevent frauds on the customs. The judgment dismissing the libel is

Reversed and the cause remanded for further proceedings in conformity with this opinion.